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CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS OF COLORADO

AT THE

**SEPTEMBER TERM A. D. 1913, AND
JANUARY AND APRIL TERMS A. D. 1914**

E. T. WELLS
REPORTER

VOLUME 25

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AUG 27 1914

COURT OF APPEALS OF COLORADO

REGULAR TERMS BEGIN ON SECOND MONDAY IN
JANUARY, APRIL AND SEPTEMBER

JUDGES OF THE COURT DURING THE TIME OF
THESE REPORTS

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EDWIN W. HURLBUT,		
WILLIAM B. MORGAN,		
JOHN C. BELL.		

BENJAMIN GRIFFITH, ATTORNEY GENERAL

JAMES R. KILLIAN, CLERK

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JUDGES OF THE DISTRICT COURT

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Haslett P. Burke.....	Thirteenth District, Sterling

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REPORTS
OF THE
DECISIONS OF THE
COURT OF APPEALS
OF THE
STATE OF COLORADO

September Term, 1913

[No. 3870.]

**THE GREAT WESTERN SUGAR COMPANY V. THE F. H. GIL-
CREST LUMBER COMPANY.**

1. MECHANIC'S LIEN—*Lien of Sub-Contractor—Filing of Contract.* The purpose of the statute requiring the contract when in excess of \$500.00 to be filed for record with the recorder (Rev. Stat., sec. 4025) was to enable the owner of the premises to limit his liability to sub-contractors and material men. By compliance with the statute the owner may pay the contractor in installments, according to the provisions of the contract, without liability to a lien asserted by any sub-contractor, unless such sub-contractor gives the notice prescribed by the statute that he "has performed labor, or furnished material, * * * or agreed to and will do so."

When the owner fails to reduce the contract to writing, or to file it, or a memorandum of it, or where the contract price is \$500.00 or less, no provision of law is made whereby the owner may so limit his liability. The sub-contractor is entitled to a lien, without giving the

notice so above specified, and regardless of the state of the account between the owner and contractor.

2. *STATUTES—Construction—Statute of Another State Adopted Here.* The statute of another state adopted into our legislation must be construed so as to harmonize with the other provisions of the enactment, and the general purpose thereof, as declared by our courts. The interpretation of such statute is not necessarily controlled by the decisions of the courts of the state from which it was adopted, following a different view and a different system.

Error to Weld District Court. HON. HARRY P. GAMBLE, Judge.

Mr. H. N. HAYNES and Mr. CHARLES W. WATERMAN for plaintiff in error.

Mr. R. G. STRONG and Mr. C. E. SOUTHARD for defendant in error.

MORGAN, J.

On rehearing; former opinion withdrawn and the following substituted.

Writ of error to reverse a judgment of the Weld district court in an action against the Sugar Company, hereinafter called the owner, and its principal contractor, Eggleston, to foreclose a mechanic's lien upon a building which the contractor agreed, orally, to construct for the owner, purchasing his material from the Lumber Company, hereinafter called the claimant, and which filed its lien statement, and began this action, within the required time thereafter. The lien law of 1899 is involved. No evidence was abstracted. There is some controversy over service by publication on the principal contractor, and default thereupon, but the principal contention is over the court's ruling on two general demurrers—one to the complaint overruled, one to the answer sustained.

The owner contends that, in case of a contract between the owner and contractor, regardless of the amount of the contract price, sub-contractors and material men,

in order to maintain a lien for any more than may be owing to the contractor when the lien statement is filed for record, must serve on the owner a written *notice* that they have performed labor or furnished material, etc., independent of the service on the owner of a *copy of the lien statement*; and claims the right to pay the contractor, in the absence of such notice, or until such notice is served, at such times as the contract may provide, and, in full, at the expiration of thirty-five days after the completion of the contract, if no such notice has been served prior thereto. The claimant contends that no such notice is required, in any case, if the contract price is \$500.00, or less, and, as a broader contention, not in any case, unless the contract or a memorandum thereof is filed with the county recorder.

These contentions must be determined from the lien act of 1899, and particularly from sections one and two, being sec. 4025 and 4026, of the Rev. Stat., 1908.

Sec. 4025, after providing, generally, that mechanics, sub-contractors and material men, although dealing with the contractor alone, have a lien upon the property of the owner benefited, states:

“In case of a contract for the work, between the reputed owner and a contractor, the lien shall extend to the entire contract price and such contract shall operate as a lien in favor of all persons performing labor or services or furnishing materials as herein provided under contract, express or implied, with said contractor, to the extent of the whole contract price; and after all such liens are satisfied, then as a lien for any balance of such contract price in favor of the contractor. All such contracts shall be in writing when the amount to be paid thereunder exceeds five hundred dollars, and shall be subscribed by the parties thereto, and the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property

to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, together with the times or stages of the work for making payments, shall, before the work is commenced, by the owner or reputed owner be filed in the office of the county recorder of the county where the property, or the principal portion thereof, is situated; and in case such contract is not filed, as above provided, the labor done and materials furnished by all persons aforesaid before such contract or memorandum is filed, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

Sec. 4026, after providing that the contract must provide for payments in installments after work is begun, that 15 per cent must be held for 35 days after the completion, that any payments made prior to dates set shall not affect liens of sub-contractors and material men, that as to them the amount of the contract shall be paid in money and shall not be affected by any indebtedness of the contractor to the owner, states:

"In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons other than the principal contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the principal contractor, and they shall have a lien for the value thereof. Any of the persons mentioned in section 1, except a principal contractor, may at any time give to the owner or reputed owner or to his superintendent of construction, agent or architect, a written notice that they have performed labor or furnished materials or both to or for a principal contractor, or any person acting by authority of the owner or reputed owner, or that they have agreed to and will do so, stating in general terms

the kind of labor or materials and the name of the person to or for whom the same was or is to be done or performed, or both, and the estimated or agreed amount in value, as near as may be, of that already done or furnished or both, and also of the whole agreed to be done or furnished, or both. Such notice may be given by delivering the same to the owner or reputed owner personally, or by leaving at his residence or place of business with some person in charge; or by delivering it either to his superintendent of construction, agent or architect, or by leaving it either at his residence or place of business with some person in charge; no such notice shall be invalid or insufficient by reason of any defect of form, provided it is sufficient to inform the owner or reputed owner of the substantial matters herein provided for, or to put him upon inquiry as to such matters. Upon such notice being given, it shall be the duty of the person who contracted with the principal contractor, to, and he shall withhold from such principal contractor, or from any other person acting under such owner or reputed owner, and to whom, by said notice, the said labor or materials, or both, have been furnished or agreed to be furnished, sufficient money due or that may become due, to said principal contractor, or other persons, to satisfy such claim, and any lien that may be filed therefor for record under this chapter, including reasonable costs provided for in this act; and the payment of any such lien, which shall have been acknowledged by such principal contractor, or other person acting under such owner or reputed owner, in writing to be correct, or which shall have been established by judicial determination, shall be taken and allowed as an offset against any moneys which may be due from the owner, or reputed owner to such principal contractor, or the person for whom such work and labor was performed."

Sec. 4033 provides that a lien statement must be filed for record, and that sub-contractors and material men

must file such statement within two months after completion of the building, and serve a copy of the same upon the owner at or before the time of filing.

The provisions for filing the contract, service of *notice*, etc., were added to the law of 1889 by the act of 1893, and retained in 1899, to enable the owner to limit his liability to sub-contractors and material men and to protect himself from the broad provisions of the law of 1889 and, with few changes, retained in the law of 1893 and 1899, which gave them a direct lien, regardless of the state of the account, except the limitation to the contract price, between the owner and his contractor. By filing his contract or a memorandum, as the law of 1893 and 1899 provides he may do, the owner may pay the contractor, in installments by the terms and provisions thereof, without fear of liens, unless the sub-contractor give him written notice of intention, or, as the statute says, written notice that he has "performed labor or furnished material,"
* * * "or agreed to and will do so."

If the owner fail to file the contract, or memorandum, as the law provides he may do, or, if the law does not require it to be filed, as in instances where the contract price is \$500.00, or less, then, in either instance, there is no way for the owner to so limit his liability. The owner in order to profit by these provisions in his behalf must have a written contract; provide in it that payments will be made in installments at times named, that nothing shall be paid in advance of the work, that at least 15 per cent of the price shall be made payable at least 35 days after completion of the contract; and then file it, or a memorandum thereof, so that sub-contractors and material men may know that he intends to avail himself of the privilege given.

It has been held in the case of *Willamette Co. v. Los Angeles Co.*, 94 Calif., 229, 37 (29 Pac., 625), that,

"Where the owner does not choose to avail himself

of the mode of limiting his liabilities provided in this section, labor done and materials furnished shall be deemed to have been done and furnished at his personal instance."

In *Small v. Foley*, 8 Colo. App., 435, 451; 47 Pac., 64, 70, the court said:

"It seems manifest that the provision (as to notice) was intended for the owner's personal benefit."

Our statute gives to sub-contractors and material men a direct lien, regardless of the state of the account between the owner and the contractor, subject only to the aforesaid provisions in the first two sections of the act, which extend (not reserve) to the owner a mode of limiting his liability.

The contention that under the constitution and the common law the owner may pay his contractor as he may choose, regardless of a sub-contractor's right to a lien, is recognized by our statute only to the extent of the privilege granted in the provisions aforesaid. Prior to the law of 1889, the owner's claim in this respect received greater consideration at the hands of our legislature than since that time. By the law of 1889, amending prior laws, no consideration or recognition whatever was given to it, but all provisions concerning notice of intention were eliminated, and all the sub-contractor or material man was required to do was to file his lien statement for record and serve a copy on the owner, at or before the filing, and bring his suit to foreclose within the time required. The 1889 act, leaving no room for critical construction, provided, as to sub-contractors, that:

"Any payments made by the owner to the contractor, either before or after making such contract, or during the erection of such building and during the time provided in which to file liens, shall be at the risk of the owner; and no such payment shall be a set-off against the claim of any sub-contractor who shall file his state-

ment for lien and serve a copy thereof, as herein provided.”

An examination of the amendments of 1889 discloses a studied and effective determination to eliminate every feature of what is known as the New York system of mechanic's lien statutes from our law, and to substitute what is known as the Pennsylvania system; the former making the sub-contractor's lien subject to the state of the account between the owner and his contractor, the latter disregarding it, both subject to modifying provisions in the statutes of the different states, following one or the other.

This 1889 act, and all acts prior thereto, were repealed in 1893 by another entire lien act which re-enacted many sections of the prior law, but again introduced features of the New York system, shown in sections 4025 and 4026, *supra*. This 1893 act is the same as the 1899 act, now under consideration, with slight modifications.

It is concluded for reasons hereinafter stated that the claimant had a lien regardless of notice to the owner or reputed owner, or state of the account between the owner and contractor, unless the owner or reputed owner filed his contract and otherwise availed himself of the privilege extended by the statute; claimants limited, of course, to the contract price. Therefore, it was not error to overrule the demurrer to the complaint and leave the owner to plead in its answer the matters, if any, relieving it from liability. The owner answered, pleading the same matters involved in the demurrer to the complaint, that: the contract between it and its contractor was verbal, for \$310.00, that it had paid him in full, in good faith, under the terms of the contract, without notice that the claimants had furnished material or intended to claim a lien, or that the contractor had not paid for the materials furnished. A general demurrer to this answer raised the same contention that arose on the demurrer to the com-

plaint, and for the same reasons it is concluded the court did not err in sustaining it.

It is only where the contract or a memorandum is required to be in writing and to be filed that any privilege is extended to the owner whereby he may limit his liability, except the limitation on claimants to the contract price. In this case the contract was not in excess of \$500.00, was not filed and the statute did not require it to be filed. All contracts of \$500.00, or less, are governed and controlled under the general provisions of the lien act giving the claimant a direct lien to the full extent of the contract price, regardless of the state of the account between the owner and the contractor, and regardless of payments made before the time expires for filing the lien statement.

The owner's contention that the provisions of sections 4025 and 4026 are privileges granted to material men and other sub-contractors, and that they must comply with the requirements thereof in all cases where there is a contract, although the owner is not required to file the same, and thus furnish the data upon which the claimant may rely, is contrary to the spirit of an act to "secure liens to mechanics and others," and not in accord with the trend of recent decisions of the supreme and appellate courts of this state, construing the same.

It may be assumed, but it is unnecessary to decide, that where the contract exceeds \$500.00, is in writing and otherwise complies with the law, and it, or a sufficient memorandum thereof is filed, it is necessary for a sub-contractor to serve a *notice* upon the owner in order to maintain a lien upon the property for any more than what may be unpaid by the owner on the contract when a copy of the lien statement is served and the statement itself is filed for record; but it is concluded that if the contract is for \$500.00 or less, or, if for a greater sum, and is not in writing, or otherwise not in compliance with

law, or it, or a sufficient memorandum thereof, is not filed, then, and in either such case, no notice is necessary, and all payments to the contractor are at the owner's peril if made prior to the expiration of the time given for the sub-contractor to serve and file for record a statement of the lien. And, as the answer in this instance relied upon a necessity of notice, but alleged that the amount of the contract price was less than \$500.00, it did not state a good defense.

Prior to the act of 1889 the sub-contractor was required to give notice of an intention to claim a lien with no exception as to amount of the contract, the contract was not required to be in writing or to be filed, and he could not maintain a lien unless at the date of his notice of lien or of his intention to file the same, "there was something due or to become due from the owner to the contractor."—*Jensen v. Brown*, 2 Colo., 694 (Law of 1872); *McIntyre v. Barnes*, 4 Colo., 285 (Law of 1872); *Epley v. Sherrer*, 5 Colo., 536 (Law of 1876); *Tabor v. Armstrong*, 9 Colo., 285, 12 Pac., 157 (General Laws of 1877); *Greeley S. L. & P. R. R. Co. v. Harris*, 12 Colo., 226, 20 Pac., 764 (Law of 1881); *Spangler v. Green*, 21 Colo., 505, 42 Pac., 674, 52 Am. St., 259 (Law of 1883).

As above stated, in 1889, the lien statute was amended, repealing and amending all sections of the prior act requiring notice of any kind except the copy of the lien statement to be served on the owner at or before the time of filing the statement for record. And all payments made before the time expired for such filing were at the owner's peril.—*Spangler v. Green*, *supra*; *Jarvis v. State Bank etc.*, 22 Colo., 309, 316, 45 Pac., 505, 55 Am. St., 129 (Law of 1889); *Sayre-Newton Lumber Co. v. Union Bank*, 6 Colo. App., 541, 546, 547, 550, 41 Pac., 844 (Law of 1889).

From an examination of these authorities in connection with the lien act of 1889, it appears that the pro-

visions of that act are fully recognized, giving sub-contractors direct liens, without regard to the state of the account between the owner and his contractor. The law of 1893 and 1899 gives the sub-contractor and material man the same direct lien limited only to the amount of the contract price; but incorporates, by sections 4025 and 4026, certain provisions whereby the owner, on complying therewith, may pay the principal contractor as the work progresses. This is a departure from the lien law prior to 1889, and eliminates the former legal conception that sub-contractors and material men's liens were subject to the state of the account between the owner and his contractor, on the contract between them.

There are two distinct conceptions of the right to a sub-contractor's lien recognized by the statutes of the various states, one, that such liens are allowed by statute through a species of equitable subrogation to the contract between the owner and his contractor; the other, because of the enhanced value of the property caused by the labor and material so contributed to it by the consent of the owner through his contractor, made his agent by statute. The latter is the conception adopted in the law of 1889 and continued in the law of 1893 and 1899, and illustrated by the following authorities. The latest announcement in this state is in the case of *Curtis v. Nunns*, 54 Colo., 554, 556, 131 Pac., 403, 404, wherein Scott, J., said:

“It would be a singular state of the law if Curtis, the owner, could, by words of acceptance addressed to his principal contractor, with no recorded contract to guide sub-contractors, thus change the actual time of completion, and in this way defeat the honest claim of a sub-contractor.”

The provisions of 4025 and 4026, *supra*, do not change the theory or policy of the law of 1889 in this respect, but continue it, as held in the case of *Chicago Lumber Co.*

v. Newcomb, 19 Colo. App., 265 to 275, 74 Pac., 786, where it is said:

“The construction of a building involves the co-operation of a variety of agencies. It is not built by the original contractor himself. It is true that he undertakes its construction, but to enable him to execute his contract, he must rely to a greater or less extent upon others. The accomplishment of the work requires the purchase of material and the employment of mechanical and other labor, of all of which the owner receives the benefit. The purpose generally of laws providing for mechanics’ liens is to afford some measure of security to those whose property and services have entered into the improvement; and such laws have, as a rule, been upheld by the courts. * * * It does not impair the obligations of contracts, but provides a method for securing payment to those whose labor or material goes into the building, and at the same time protects the owner and contractor, if the provisions of the act are complied with. The doctrine upon which such liens are founded is the consideration of natural justice that the party who has enhanced the value of the property by incorporating therein his labor or materials shall have a preferred claim, in a certain sense, on such property, for the value of his labor or materials. * * * The foregoing sections provide the form of contract which must be entered into by the owner and the principal contractor to enable the latter to secure a lien for himself, and to enable the former to confine the liabilities to which his property may be subjected, to the contract price. * * * By virtue of the law the contractor is invested with the power to charge the property for the reasonable value of the labor and materials supplied to it by sub-contractors. The right of lien arises from the statute, which applies by its own force, to every transaction that parties, by their voluntary action, bring within its terms. No one is deprived

thereby of the gains of his own industry. The legislative purpose is quite the contrary. It is rather to prevent one man from enjoying, without compensation, the gains of another's industry in circumstances which the law-makers regard as imposing a duty on the former to see that the latter is paid therefor. * * * Without express provision, the contractor would possess the powers of an agent. It is in virtue of his power to incumber the property by procuring material and labor that the right to a lien accrues to persons furnishing him with those things. In *O'Neil v. St. Olaf's School*, *supra* [26 Minn., 329, 4 N. W., 47], it is said that 'the statute gives as an incident to a contract for erecting, altering or repairing a house, power to the builder or contractor to charge the house and the land with debts for labor and materials incurred by him in performing the contract. The owner consents to this power conclusively and irrevocably, so far as others than the builder or contractor are concerned, by making the contract while such is the law.' See also *Laird v. Moonan*, 32 Minn., 358 [20 N. W., 354]."

In the case of *Lindeman v. Belden C. M. Co.*, 16 Colo. App., 342, 346, 65 Pac., 403, 404, it is said, also:

"The leading idea of mechanic's lien statutes, the basic principle upon which they are founded, the object which they seek to subserve, and to which all their provisions tend, is to secure the mechanic and material man upon values they have directly contributed to create—to give to such, who by their labor and material have enhanced the value of property, the security of a lien thereon, to the extent they have thus added to its value.—*Barnard v. McKenzie*, 4 Colo., 253; Boisot on Mechanics' Liens, sec. 7; Phillips on Mechanics' Liens, secs. 9-13."

In the case of *Sierra N. L. Co. v. Whitmore*, 24 Utah, 130, 66 Pac., 779, and *Carey-Lombard Lumber Co. v. Partidge*, 10 Utah, 322, 37 Pac., 572, it is held under a statute requiring notice of intention to claim a lien besides the

filing of the lien statement by sub-contractors, that the owner is charged with notice as of the date of commencing to work or furnishing materials by sub-contractors, of their lien, by virtue of the original contract, together with the statute making the lien relate back to the commencement of the work or the furnishing of materials by the sub-contractors; and that the notice of intention refers only to sub-contractors who intend in the future to do work or furnish materials, and not to those who are furnishing or have furnished the same. In the case of *Gilchrist v. Anderson*, 52 Iowa, 274, 13 N. W., 290, it is held that if the owner knew that material was obtained from someone by the contractor, that such knowledge put the owner upon inquiry and that no notice was necessary of intention to claim a lien. These cases serve to illustrate that the courts desire to uphold the direct provisions of a lien given to sub-contractors and material men.

It is unnecessary to cite further authorities so construing lien statutes favorable to sub-contractors and material men, but the following may be consulted: 2 Jones on Liens, sections 1304 *et seq.*, 27 Cyc., 89 *et seq.*; *Jones v. Great Southern Hotel Co.*, 86 Fed., 370, 30 C. C. A., 108; *Hightower v. Bailey et al.*, 108 Ky., 198, 56 S. W., 147, 49 L. R. A., 255, 94 Am. St., 350; *Laird v. Moonan*, 32 Minn., 358, 20 N. W., 354; *Colter v. Frese et al.*, 45 Ind., 96; *Henry-Coatsworth Co. v. Evans*, 97 Mo., 47, 10 S. W., 868, 3 L. R. A., 332; *Aste v. Wilson*, 14 Colo. App., 323, 59 Pac., 846.

In the case last cited the court, in considering the law of 1893 with reference to liens of sub-contractors, suggests, without deciding, that the lien statute of 1893 gives a direct lien to such persons, and calls attention to the case of *Jarvis v. State Bank*, *supra*, in which the supreme court expresses the view that a sub-contractor's right to a lien cannot be cut off and destroyed by the

terms of the contract between the owner and the principal contractor; both opinions citing the following cases upholding the direct lien theory of our statute: *Clough v. McDonald*, 18 Kan., 114; *Chicago Lumber Co. v. Woodside*, 71 Iowa, 359, 32 N. W., 381; *Lonkey v. Cook*, 15 Nev., 58; *Gull River L. Co. v. Keefe*, 6 Dak., 160, 41 N. W. Rep., 743; *Albright v. Smith*, 2 S. D., 577, 51 N. W. Rep., 590; *Laird v. Moonan*, *supra*; *Hall v. Mulamphy P. M. Co.*, 16 Mo. App., 454.

The decisions to the contrary upholding the first theory aforesaid are numerous, strong and conclusive, but under statutes favoring the owner and following the New York system. See 2 Jones on Liens, *supra*; 22 Cyc., *supra*, and the case of *French v. Bauer*, 134 N. Y., 548, 32 N. E., 77, 20 L. R. A., 560, and extended note.

Preliminary to the final question involved herein the question may be considered whether the acts of 1893 and 1899 so changed the law of 1889 as to shift the burden of watchfulness back to the sub-contractor and material man as it was prior to 1889; or, whether by those later acts such burden was left upon the owner as in 1889, except as to the provision granted to the owner in sections 4025 and 4026, by complying with which he could thereby shift such burden to the sub-contractor and material man, so that they would have to serve their notice of intention upon him. The latter is the more reasonable. The first paragraph of section 4025 gives a direct lien in plain language. In the second paragraph it is provided, "in case of a contract," such lien is limited to the contract price whatever it may be; then follows the privilege given the owner to make payments as the work progresses by making the contract as provided and by putting it in writing and filing it; then, the owner having done this and thus given the data to the claimant, a privilege is thereafter given the claimant, whereby he may stop those payments or enable the owner to do so, by

serving on him the notice, upon which the owner must protect himself by retaining the money necessary to satisfy the claim or the subsequent lien.

Now, the vital question in this case is reached as to the claim of plaintiff in error that, as alleged in the answer, because the contract was for less than \$500.00 it could, and did, in good faith, pay the contractor, in full, according to the contract, no notice of intention being served upon it by the claimant, or lien filed, before the payment was made. In other words, it is contended that the claimant must serve the notice, and do so before the owner pays the contractor, even though the contract is not in writing, and not filed and no other notice of it or its contents, amount, dates of payments, etc., is given to the claimant, so that he may know when to serve the same, and whether it will avail him anything if he should serve it. It is true that he could inquire as to the contract and possibly ascertain in some way what it contained, but his information so obtained would not be so unchangeable and certain as the filing would give him, in case he succeeded in obtaining any information at all. The law would not force such uncertainty upon him. The very purpose of the requirement as to filing the contract or a memorandum is to give notice to a claimant so that he may act intelligently in reference to serving the notice on the owner. Such purpose plainly appears from the quotation, *supra*, from the case of *Curtis v. Nunns*, and also from the following from the case of *Chicago Lumber Co. v. Newcomb*, *supra*:

“The purpose of recording the contract prescribed by the statute is to advise persons dealing with the contractor of its contents, so that, as they have no remedy against the property for claims in excess of the contract price, they may act intelligently and be able to determine whether the security is sufficient to justify them in parting with their material or expending their labor. It is

asserted that the cross-complainants had such knowledge of this contract; and if it had been a contract for the recording of which the statute provides, it may be that their knowledge would take the place of a record. But it was not the contract to which the requirement was intended to apply. The contract to be recorded is a contract, the terms of which are contained in the statute."

It would seem, therefore, that, if by the statute no notice from the owner is required, so that the sub-contractor may act intelligently, then it was intended that no notice is required from the sub-contractor to the owner; and, as the statute does not require the contract to be filed in cases where it is \$500.00 or less, then the sub-contractor is not required to serve a notice in such case. Hence, the contention of appellant, owner, is untenable that it may have a contract of \$500.00 or less, not in writing, and no memorandum filed or other notice given of it, yet, the claimant must, nevertheless, gain his intelligence to guide him from some other source and serve the notice the same as if the contract was in writing and filed. It must be assumed that the legislature intended that in case of small contracts of \$500.00 or less, or where there was none, that the owner must protect himself from liens of sub-contractors and material men as he was required to do, in all cases, by the law of 1889, from the commencement of building up to the last day of filing for record the lien statement. It seems plain, also, from the phraseology of all that part of sections 4025 and 4026 following the requirement that all contracts over \$500.00 shall be in writing, that such part refers only to written contracts, that is, contracts over \$500.00; and that the written notice required therein refers only to written contracts. As suggested by Scott, J., in the case of *Curtis v. Nunns*, *supra*, it would be a strange requirement of the law that a sub-contractor should be required to give a written notice of intention

to claim a lien when the contract between the owner and his contractor is not required to be in writing, not required to be filed, nor any other requirement made of the owner to furnish data upon which the sub-contractor could act, and at the same time destroy his right to a lien if he should fail to act intelligently, or within the proper time.

Such is the only reasonable construction of this statute, fair between the owner and the sub-contractor, unless it be held, according to the broader contention of the defendant in error, the claimant herein, that even contracts of \$500.00 or less, or a memorandum thereof if oral, should also be filed by the owner. Though the latter construction may appeal to the legal mind, it cannot be said that such was the intention of the legislature, because, if so intended, it would not be necessary to separate such contracts into two classes; furthermore, our courts are more or less committed against it, as shown from the cases of *Curtis v. Nunns*, *supra*, at p. 557, and *Foley v. Coon*, 41 Colo., 432, 435, wherein the opinion indicates that "in certain cases" only must contracts be filed.

It is contended that, as the supreme court of California, under a similar statute, from which it appears our statute was derived, has held, prior to our adoption of it, that the sub-contractor must serve on the owner the notice of intention in all contracts, whether oral or in writing, and regardless of the amount thereof, therefore, our courts should follow such California decisions. The following reasons are given for not following the California construction.

First. The courts of that state have continuously followed the New York system and held that sub-contractors' liens are subordinate to the state of the account between the owner and the contractor under statutes of that state similar in all material respects to our statute

of 1889, while our courts in construing that statute have followed the Pennsylvania system, and held the contrary. Prior to 1885 the lien statutes of California, back as far as 1872, were practically the same as our statute of 1889, giving a direct lien to sub-contractors, not requiring the contract to be in writing or to be filed, and not requiring any notice of intention; yet, its court held that, even under those statutes, the owner could pay the principal contractor according to his contract, and that the sub-contractor's lien was limited to whatever might still be owing at the time the lien statement was required to be filed by the sub-contractor.—*Wiggins v. Bridge*, 70 Calif., 437, 439, 11 Pac., 754; *McCants v. Bush*, 70 Calif., 125, 126, 11 Pac., 601. Our courts, on the contrary, have duly recognized the legislative enactment of 1889 and have held that under that act the owner could not pay the contractor, except at his peril, until after the time expired for the sub-contractor to file his lien statement; and when such lien statement was filed the lien related back to the commencement of the work and extended to the full amount of the contract price, regardless of the payments made by the owner to the contractor.—*Spangler v. Green*, 21 Colo., 505, 509; *Jarvis v. State Bank*, 22 Colo., 309, 316; *Sayre-Newton Lumber Co. v. Bank*, 6 Colo. App., 541, 549. Furthermore, in the case of *Aste v. Wilson*, 14 Colo. App., 328, the court, construing the decision of *Bowen v. Aubrey*, 22 Calif., 566, said:

“In that case it was held that the sub-contractor knew that there was a contract between the owner and the general contractors, and this was sufficient to put him upon inquiry, and he was to be considered as affected with notice of the contents and stipulations of this contract. In that case, also, the original contractor had expressly by his contract waived his own right to file a lien, and the court said that the sub-contractor had no higher rights than the original contractor. How far these considerations affected the decision does not appear.

“In a subsequent case, *Dore v. Sellers*, 27 Calif., 594, the court, speaking of the right which the employes of a contractor have to assert a lien under the statute, said, that they had the right, not for the reason that the employer's property had been benefited by the labor or material furnished by the employes, but because they had furnished the labor or material for the contractor to whom the law had granted a lien for the amount which became due to him under the contract in consequence of their labor and material. It would seem, therefore, that under the statute of that state, as construed by the supreme court, that the lien of a sub-contractor or other employe was not direct, but depended upon the contract of the owner with the principal contractor.”

In the same case the court, referring to *Jarvis v. State Bank, supra*, says that the court in that case intimates quite strongly that there may be serious doubt as to the soundness of such doctrine in this jurisdiction; the court then cites several cases following the Pennsylvania system contrary to the California doctrine.

It would be expected, therefore, that the California courts would construe the 1885 law of that state (which is the law from which sections 4025 and 4026, *supra*, were derived) in conformity with their previous decisions; but, considering the opposite view taken by our courts of the same kind of a law, it would not be expected that they would now adopt the view of the California courts in construing said sections.

Second. The doctrine in California so construing the law of that state to 1885 has been repudiated by the courts of several states that had adopted such statutes, and they have held that the sub-contractor's lien under such statute was not subject to the state of the account between the owner and his contractor and have distinctly refused to follow the California construction.—*Hunter v.*

Truckee Lodge, 14 Nev., 24; *Merrigan v. English*, 9 Mont., 113, 22 Pac., 454, 5 L. R. A., 837; *Spokane v. McChesney*, 1 Wash., 609, 21 Pac., 198; *Hobbs v. Spiegelberg*, 3 N. Mex., 222, 5 Pac., 529; *Allen et al. v. Redward*, 10 Hawaii, 151, 156.

The courts of those states have, like the courts of this state, construed a similar law to ours of 1889 and California's prior to 1885 differently from the California courts, although those states had adopted the California law existing prior to 1885. It would be natural for our courts to continue in their own footsteps and in the footsteps of the courts of other states traveling the same highway. It is true those other states have not adopted the California law of 1885, as this state has done, by taking from it sections 4025 and 4026, *supra*, and they have not therefore construed the provisions of these sections, but it is safe to say, from their foregoing decisions, that if ever called upon they would construe such provisions the same as construed herein. Our court will now be the first outside of California to construe them.

The first construction of these provisions by the California courts occurred in September, 1890, less than three years prior to our adoption of them, in the case of *Kerchoff-Cusner Co. v. Cummings*, 86 Calif., 22, 24 Pac., 814 (three judges out of seven dissenting). The opinion was based wholly upon a former opinion that did not warrant the advanced view announced; the construction in that case, however, has been followed since, with it as a precedent.

The following quotation is given from the opinion in the Kerchoff case to show the California construction: "no part of the contract price under such a contract (\$1,000.00 or less, \$500.00 or less in Colorado) need be withheld by the reputed owner; and he may pay the whole of it to the contractor before the commencement or after

the completion of the work, unless the notice prescribed is given."

It will be seen that such construction is that no part of sections 4025 and 4026, following the provision as to contracts necessary to be in writing, applies to contracts of \$500.00 or less, except the provision requiring notice to be given by a sub-contractor and material man. What good would notice do if the owner could pay the contractor in full before the commencement of the work? And why should the burden of these requirements be sustained by the sub-contractor in all cases and the owner be relieved therefrom where the contract is \$500.00 or less? Such construction practically deprives a sub-contractor and material man of any lien where the contract price is \$500.00 or less. It is contrary to the spirit and purpose of such lien laws, and contrary to the general view of our courts.

Furthermore, the incorporation of these two sections into our lien law, then existing, must be construed in harmony with the entire law and the general policy and purpose thereof in this state, and not necessarily in conformity with the decisions of another state following lines parallel with a different view and a different system. The conclusions herein reached meet the demands of justice so that liens may be had by sub-contractors and material men when the contract is for \$500.00 or less the same as when it is for a greater sum, without requiring them to give a prescribed written notice without any certain information or recorded data upon which to rely; especially so, as our statute does not require the owner to retain the fifteen per cent of the contract price until after the date for filing the lien statement as the California law requires.

In regard to the owner's contention concerning personal service upon the contractor and the necessity of a personal judgment against him, it is concluded that the

constructive service had and provided by the lien act was sufficient to enforce the lien; and that the publication of the *alias* summons was without substantial injury to the owner.

Judgment Affirmed.

CUNNINGHAM, Presiding Judge, dissenting:

Our Lien Act here under consideration is almost an exact duplicate of the Mechanic's Lien Act of California, as the same existed in 1899, the date of the adoption of our act. The chief difference in the two acts being that in California building contracts exceeding one thousand dollars are required to be recorded, while in our act the amount of such contracts was reduced from one thousand to five hundred dollars. No one can read the California act and our own without coming to the conclusion that whoever prepared the bill which our legislature passed must have had constantly before him the California statute. I believe the statute of no other state is so nearly like our own. Before our act had been adopted, the California courts had frequently placed a construction upon their statutes quite contrary to the conclusion reached in the majority opinion in this case.—*Sidlinger v. Kerkow*, 82 Calif., 42, 22 Pac., 932; *Kerckhoff-Cuzner Co. v. Cummings*, 86 Calif., 22, 24 Pac., 814; *Dennison v. Burrell*, 119 Calif., 180, 51 Pac., 1.

Upon an examination of these cases it will be seen that that state had at least thrice held that a contract under one thousand dollars (five hundred dollars in our state) need not be recorded, but that laborers and material men, where the contract was less than that sum, could acquire no right whatever as against the owner, without first serving a preliminary notice (or, as it is sometimes called in California, a "stop notice"), and that when

such preliminary notice was served, the right of the claimant was limited to the money in the hands of the owner intercepted by this notice, or to the amount to become due the contractor after the serving of the same.

In *In re Inheritance Tax, Macky Estate*, 46 Colo., 79, 102 Pac., 1075, at 92, our supreme court, in a unanimous opinion, participated in by the entire bench, gave to this rule of statutory construction great force, referring to it in this language:

“As our law was adopted after that decision was rendered, the utterances of the Illinois court come to us with a force like unto that of a legislative enactment.”

The majority opinion is, in my judgment, arrived at by violating the rule of statutory construction here under consideration, and by refusing to follow the doctrine touching this rule as announced in the Macky case.

For these reasons, I am compelled to dissent.

Decided March 10, A. D. 1913.

Judgment affirmed on rehearing November 10, A. D. 1913.

[No. 3881.]

THE GREAT WESTERN SUGAR COMPANY v. THE F. H. GILCREST LUMBER COMPANY.

1. MECHANIC'S LIEN—*Service of Lien Statement Upon Agent.* The defendant being a foreign corporation, service of the statement of the lien required by the statute (Rev. Stat., sec. 4033) upon its cashier and bookkeeper, at the factory in the town where the building was erected, held sufficient.

2. — *That the material for which the lien is claimed went into the building*, the testimony examined and held sufficient. As to all other questions the judgment controlled by the opinion in No. 3870, *ante*, 1.

Error to Weld District Court. HON. HARRY P. GAMBLE, Judge.

Mr. H. N. HAYNES and Mr. CHARLES W. WATERMAN for plaintiff in error.

Mr. R. G. STRONG and Mr. C. E. SOUTHARD for defendant in error.

MORGAN, J.

On rehearing, original opinion withdrawn and the following substituted.

This case involves a writ of error similar in every material respect to case number 3870 of this court, just decided, except that in this case the answer of the owner does not state the contract price between it and the contractor for the construction of the house, and with the further exception that in this case the owner contends, in addition to the errors assigned in the other case, that the lien claimant did not prove that the person on whom the copy of the lien statement was served was the agent of the owner, such agency being in issue and the burden being upon the lien claimant; and that the evidence of the claimant was insufficient to prove that all material for which the lien is claimed was received by the contractor and used in the building.

The absence of a statement in the answer as to the amount of the contract price renders the answer less sufficient to constitute a defense, under the conclusions reached in the other case, than the answer in that case, hence the views announced in that case govern the contention here.

As to the proof concerning the agency of Crawford, the person on whom the copy of the lien statement was served, it is sufficient to warrant the foreclosure of the lien. This contention is highly technical because there is no statement in the answer nor any contention in the record or the briefs that the owner was not fully informed by the service as made, or that it was in any way injured or prejudiced. The answer itself states that when the copy of the statement was delivered to said Crawford the owner was not indebted to the contractor in any sum whatever, and that long prior thereto the

owner had paid the contractor in full. The answer admits that Crawford was cashier and bookkeeper of the owner's sugar factory in the town where the evidence showed the building was constructed, and, as the sugar company was a foreign corporation, and was constructing this building as such, the proof was sufficient in this regard under the circumstances.

The proof was also sufficient that the materials were used in the construction of the building. It appears from the evidence introduced by the claimant that none of the items of account for which the lien is claimed were delivered elsewhere than "at the job," and that no other structure was being built by the said contractor or his men near said job at the time of the deliveries. The evidence shows that the entries of the items were just and true and made in the regular course of business. One witness testified that he would not say that every one of said pieces went into the building, but he would say, "all that I know about it is they were delivered there. I knew that practically the quantity of repairing and alterations done there required about such deliveries as I made. I saw the porch columns and windows put in; also many other things hauled I saw in the house there—put into the building." This, together with other testimony identifying the building with the materials furnished was sufficient, the owner introducing no testimony.

For these reasons, together with those given in case number 3870, the judgment is affirmed.

CUNNINGHAM, P. J., dissents.

Decided March 10, A. D. 1913.

Judgment affirmed on rehearing November 10, A. D. 1913.

[No. 3654.]

MODERN WOODMEN OF AMERICA V. THE INTERNATIONAL
TRUST COMPANY, GUARDIAN.

1. FRATERNAL SOCIETY—*Knowledge of Falsity of Representations in Application for Membership.* Action upon the insurance clause of a

certificate of membership. It was clearly made to appear that the statements of the member, in his application, as to his habits in the matter of the use of intoxicating liquors, were false. But it appeared that, before accepting the application, one Hume, who it was contended was the representative of the society, had been expressly told that the applicant would not be a desirable member, that "he drank too heavily." Another witness, an intimate friend and associate of the member, had said to Hume, in speaking of the member, some two weeks after the occurrence, that "he would not write him up * * * that he was too much of a drinker." The plaintiffs contended upon this that the society were fully informed of the falsity of the statements of the applicant, before accepting his application, had accepted membership fee and expenses with such knowledge, and were therefore estopped to deny liability. *Held* that the statements of the witnesses relied upon were not necessarily conflicting with the statements of the application; that neither of the witnesses gave any idea of the amount or quality of intoxicating liquors consumed by the member, or how frequently indulged; that their expressions were mere hazy opinions, founded on no facts disclosed in the record, and that the society was not under duty to pursue an investigation beyond the medical examination.

2. **PRINCIPAL AND AGENT—*Evidence of Agency.*** The evidence examined and held insufficient to show that the alleged representative of the society was in fact such representative.

3. — ***Knowledge of Agent—How Far the Principal Is Charged by.*** The rule which charges the principal with the knowledge of the agent is for the protection of innocent third persons, and not those who use the agent to effect a fraud upon the principal.

4. **CONTRACTS OF INSURANCE—*Construction—Limitations Upon Authority of Soliciting Agent.*** When not controlled by statute, contracts of insurance are construed by the same rules of law as other contracts.

An insurance company, when not restricted by statute, may limit the authority of its agents, and an applicant for insurance dealing with an agent whose authority is limited by the express terms of the application cannot benefit by any act of the agent in excess of his authority as so limited.

The applicant for insurance is presumed to read the application which he is required to sign.

Supreme Lodge v. Davis, 26 Colo., 252; *Pacific Life Company v. Van Fleet*, 47 Colo., 401; *Sun Fire Office v. Wich*, 6 Colo. App., 113; *Merchants' Company v. Harris*, 51 Colo., 109, examined and distinguished.

5. — ***Insurance Obtained by Fraud—Premiums***, are forfeited.

Appeal from Denver District Court. HON. HUBERT L. SHATTUCK, Judge.

MR. TRUMAN PLANTZ, MR. TULLY SCOTT and MR. GEORGE C. PERRIN for appellant.

MR. S. D. CRUMP and MR. HENRY C. ALLEN for appellee.

BELL, J.

This case was ably presented in the principal and supplemental briefs originally filed and oral arguments made previous to our opinion heretofore announced; but other points are raised and authorities cited in the petition presented for a rehearing, which is denied, and, for a more orderly disposition of all the questions now herein involved, our original opinion is hereby withdrawn and substituted by the following:

The action was brought by the International Trust Company, appellee herein, as guardian of the minor heirs of Henry Conter, against the Modern Woodmen of America, appellant, a fraternal benefit society organized under the laws of the state of Illinois, and doing business in the state of Colorado under section 73, chapter 70, of the Revised Statutes of 1908. Said society has a lodge system with a ritualistic form of work, a representative form of government, and is self-governing in its administration, and, in the early part of the year 1909, organized a local camp at Globeville, Colo. On the 2nd day of February, 1909, Henry Conter, above named, made application to said society for membership in said Globeville camp, and for a benefit certificate in the sum of \$3,000.00, and, in said application, which was in writing, warranted that all statements and answers by him made therein were full, complete and literally true, and especially agreed therein that the literal truth of each answer should be a condition precedent to any binding

contract issued upon the faith of such answers, and agreed that they should become a part of the benefit certificate. In the last paragraph of said application, immediately preceding the signature of the applicant, his attention was especially called to the following notice:

“That inasmuch as only the head officers of the society have authority to determine whether or not a benefit certificate shall issue on any application, and as they act upon the written statements, answers, warranties and agreements herein made, no statements, promises, knowledge or information had, made or given by or to the person soliciting, taking or writing this application, or by or to any person shall be binding on the society, or in any manner affect its rights, unless such statements, promises, knowledge or information be reduced to writing and presented to the head officers of the society at or before the time any benefit certificate shall be issued hereon; and I further agree that if any answer or statement in this application is not literally true, or if I shall fail to comply with or conform to any and all by-laws of the said Modern Woodmen of America, whether now in force or hereafter adopted, that my benefit certificate shall be void.”

On the same day, February 2nd, 1909, the applicant appeared before Dr. Van Landingham, the examining physician for the society, and, in answer to the questions contained in his application, purported to state his family history, his health condition, and habits. The answers thus made by him were written by the examining physician in the application, which was subsequently signed by the applicant, and represented, in substance, that he had not, in the last seven years previous to the date of his application, been treated by or consulted any person, physician or physicians in regard to personal ailments; that he never had any local disease, personal injury, or serious illness; that, at the time of the examination, he

was of sound body, mind and health, free from disease or injury, and of good moral character and exemplary habits; that he did not use intoxicating liquors daily; that he had never been intoxicated; and that the kind and quantity of intoxicating liquors consumed by him was "an occasional beer." On the 19th day of March, 1909, the appellant issued a benefit certificate to the applicant, on said application and the answers contained therein, and on April 11th, 1909, twenty-three days after issuing the same, the assured died from fatty degeneration of the heart. The appellee, as guardian of the minor children of the assured, sought to collect from the appellant the sum of \$3,000.00 as provided in the benefit certificate, and brought suit in the district court of the city and county of Denver for the amount. The appellant resists payment of this certificate because, it avers, the assured made false statements in his application in regard to his health and habits, and that at the time he made such statements he had a disease of the heart, and was intemperate in the use of intoxicating liquors, which was the indirect cause of his death, and that such false statements and intemperance on the part of the assured, under the terms of his application and the by-laws of the society, render his certificate null and void. The appellee denies the above charges, and alleges that, if they are true, the agents and officers of the appellant society knew the actual condition of affairs at and before the time of issuing the certificate, and accepted from the assured his dues, premiums and fees with full knowledge of these conditions, and has, therefore, waived the conditions in this respect in the application, its by-laws and the certificate, and is estopped from asserting a forfeiture.

On the 12th day of April, 1909, Doctors Carlin and Bennett held an autopsy on the body of the assured, and were able to, and did, determine that the assured died from fatty degeneration of the heart; but were unable

to determine, from their examination of the body, the primary cause of the disease. Dr. Carlin testified that fatty degeneration of the heart is an affection which "causes the muscular fibres of the heart to change into fat surface and become friable and soft" so that the finger might be pushed through with very little effort, while the ordinary heart is tough, and that, in the case of the assured, the disease was in an advanced stage, and the heart reduced in size. He further testified that the primary cause of the disease is any wasting disease of the body, such as cancer, tuberculosis, alcoholism, and long sieges of typhoid fever, diphtheria, arsenical and phosphorous poisoning, and Dr. Bennett adds to these torpidity of liver, poor circulation, bad digestion, and other things which tend to upset the heart. The witness Miller, a druggist, testified that he thought the assured was suffering from heart trouble for some time before the date of his application, because of his bad complexion and complaints of dizziness, and had sold him strychnine tablets to relieve him of this trouble, but did not advise the assured that they were for this purpose. Another witness, Jennie Sardakovski, who was well acquainted with the assured and had business transactions with him, testified that about a year before his death, and again about two weeks previous thereto, she saw him taking tablets which, he told her, were for his heart. Dr. Lee testified that he examined the assured for a policy in the Prudential Insurance Company about thirty days previous to his death, or seven days before the certificate in question was issued, and found his heart action to be very rapid. Counsel for appellant endeavored to have the witness state the cause assigned to him by the assured for this abnormal condition, but, upon objection of the appellee, the court refused to hear the testimony.

It also developed at the trial that for the last four and one-half years of the assured's life he habitually in-

dulged in the use of intoxicating liquors, using both beer and whiskey. Charles Newman testified that he knew the assured personally for a period of five years before his death; that they lived within three blocks of each other, and for weeks at a time he would see him daily, and at times he would not see him for a week or two; that whenever they met the assured took a drink of beer, and sometimes two, three or a whole lot more; that they both drank about the same, and would send for a can of beer and drink together; that it was a daily occurrence for the assured to drink beer when they were together, and, at times, but not frequently, the witness saw him under the influence of intoxicating liquors; that they both got drunk together, but not often; and that he, the witness, solicited applications for membership in the Globeville camp, but refused to take the assured's application, because he was too much of a drinker, to his knowledge, for fraternalism. Michael Pishko testified that he worked for the assured for more than four years immediately prior to his death; that he drove the wagon in the mornings and cut meat in the afternoons; and that, during this time, he drank whiskey and beer with the assured. His examination, in part, is as follows:

"Q. Did his habit of taking drinks extend over the whole period of four years that you knew him? A. Yes, sir.

"Q. Did he become intoxicated or under the influence of liquor? A. Under the influence? Yes, sir.

"Q. Did it (Conter's drinking) cover this period generally, every day or every week? A. Yes, sir; I suppose he took his drink every day."

Pishko also testified that he saw the assured drink beer the day he died. Jennie Sardakovski testified that the assured occupied the ground floor of her building and slept in a bunk behind the ice-chest, at least part of the time, for three years immediately prior to his death;

that she saw him nearly every day; that she saw him drinking whiskey and beer in the store; and that the year before he died he drank heavily some days, and some days he did not. C. M. Higdon testified that he was a Denver policeman on the beat where the assured did business and saw him almost daily for a period of four and a half years before his death; that the assured had the reputation of being, and was, a very heavy drinker, and was frequently intoxicated during this time; that he, the witness, was called upon to arrest the assured three different times for intoxication and disturbance; and that such periods of intoxication occurred during the entire four and a half years that the witness knew the assured; that the assured, during the last six or eight months of his life, kept a jug of whiskey and a case of beer in his place of business and served it to his customers and drank with them; that he was a customer of the assured and drank with him several times, and at such times the assured drank more than he did, he generally taking but one drink while the assured took two or three; and that the assured was exceedingly liberal in treating his friends and customers.

The foregoing statement of the testimony convinces this court that no safe or conservative insurance company or society would have accepted this risk with knowledge of the excessive drink habits of the assured, as above detailed. In fact, appellee's counsel made no special effort to refute the evidence of the dissipated practices of the assured, but rather defended on the ground that the appellant society received the application, initiation charges and legal fees of the assured, and accepted him, with full knowledge of his intemperate habits, and is therefore estopped from benefiting by his false answers. The majority of this court takes a different view of the evidence from that presented by appellee's counsel. Dr. Van Landingham, examining physician for appellant, testi-

fied that he had seen, but thought he had no acquaintance with, the assured at the time of the examination; that he read the questions from the application, and the assured answered yes or no, whatever was required, and he wrote the answers as they were given. There is no pretense that the answers were not written as the assured gave them. It is shown by Dr. Van Landingham that he was employed by the appellant society, through Mr. Hume, to make the medical examinations, but there is no evidence that he knew anything whatever about applicant's drink habits. It is claimed, however, that Miller and Newman notified Hume of these habits. The testimony of Miller is that he "met him (Hume) when he first came out there to organize a lodge of Woodmen. * * * I think I was one of the first men that was consulted by Mr. Hume as a prospective member. * * * I told Mr. Hume that Henry Conter was not a desirable member for the organization. * * * That he drank too heavily; and I thought his heart was in bad condition."

"Q. On what did you base your information that you gave Mr. Hume, as to his being a heavy drinker?
A. Personal observation, I guess.

"Q. You knew that to be a fact? A. I knew that he drank more than I would want to drink.

"Q. Well, in your opinion, he drank so much that you suggested that he was not a fit person, because, as one of the reasons, that he was a heavy drinker? A. Yes, sir."

The witness Newman testified as follows:

"I came in there (Conter's store) to write a party up, and I wrote him up, and he came up and started to ball me up about insurance, and I said 'You need not talk about it. I would not have you in the Modern Woodmen or any other lodge.'

"Q. I mean between you and Mr. Hume. A. Well, that happened about two weeks afterwards. I told him I

would not write him up, for I was—he was telling me that he is paralyzed.

“Q. What reason did you give for not writing him up? A. That he was too much of a drinker, to my knowledge, for fraternalism.”

It is difficult for us to see how the statement made by Newman could have made any substantial impression upon Hume as to assured's drink habits. Newman seems to have been a bosom companion of the assured, and stated in his testimony that they were frequently associating and drinking together, and got drunk together, but not often, and that they both drank about the same. If the witness considered the assured too much of a drinker for fraternalism, we are unable to see how he could have regarded himself as a fit member for fraternalism. From the relations existing between Newman and the assured, the remark made in reply to the assured's "balling up" the witness would appear very inconsistent and unnatural, unless made in a mere spirit of pleasantry between two intimate friends.

After creditable efforts were exerted by counsel for appellee to obtain some fact that was put into the possession of Hume showing the intemperate habits of the assured, they dismally failed. Conter was sent to the examining physician and told him, in substance, that his habits were exemplary; that he never had been intoxicated; that he did not use intoxicating liquors daily, and that the kind and quantity of intoxicating liquors consumed by him was an occasional beer. The statement made by Miller to Hume that the assured drank too heavily, and the statement of Newman to Hume that the assured "was too much of a drinker, to (his) knowledge, for fraternalism" were vague opinions of the witnesses which did not necessarily conflict with the statements of the assured in his medical examination. Either of the witnesses, for aught we know, may have thought that

“an occasional beer” was drinking too heavily, or Newman may have thought “an occasional beer” made the assured “too much of a drinker for fraternalism.” Neither of the answers of these witnesses gave Hume any idea of the amount or quality of intoxicating liquors consumed by the assured or the frequency of his indulgences. They were mere hazy opinions bottomed on no facts disclosed in the record at least, and, in our opinion, under the condition of the record, no rule of ordinary diligence required the appellant to pursue its investigation beyond the medical examination. It will also be observed that the opinion of Newman was not expressed to Hume until two weeks after the assured “balled up” the witness for insurance, and there is neither evidence nor presumption that the physician’s examination and the acceptance of the application were not then completed. There is a great dearth of evidence as to the position of the agent Hume. At the trial, counsel for appellee requested that counsel for appellant admit that Hume “was an assistant of the deputy head consul.” Counsel for appellant replied: “He was assistant deputy of the head consul with the limited power, only, to solicit members.” Counsel for appellee then said: “We want to offer especially out of the by-laws of the defendant chapter 27, consisting of sections 210 to 222, inclusive,” which were admitted, showing the authority possessed by head and deputy head consuls, but make no reference to the authority of an assistant of such deputies. They gave deputy head consul authority to solicit members and organize local camps when and wherever the head consul might direct, and permitted him to collect and retain the membership fee of not less than \$5.00 for his services, and to solicit members for organized camps, when short of members, on the same terms. Counsel for appellee, in argument, speak of the organization of the Globeville camp by Hume; however, the evidence

does not bear this out. The record shows that Hume secured Dr. Van Landingham as examining physician for the camp, consulted with Miller when he first arrived about the organization of said Camp, solicited and obtained the applications of Miller and the assured, and this is about the extent of his participation in the business of the organization found in this record. There seemed to be a contention of counsel as to whether he really organized the camp. Counsel for appellee intimated that he did, while counsel for appellant insisted that he did not, and each of the parties tried to establish its contention by the evidence of A. W. Miller, who was elected clerk of the local camp at the time of its organization. Appellee's counsel asked the witness:

"Q. You do know, however, that he was the man who organized the local camp * * * ? A. He is the man who took my application."

Counsel for appellant later asked:

"Q. Mr. Miller, as a matter of fact, Mr. Hume did not organize the camp, did he? A. I do not believe that I said he did, did I?"

There is no adequate proof that the agent Hume organized the local camp or had any authority to do more than select the examining physician, solicit applications and forward them to the head officers of the society; and, if we are to be governed by Miller's testimony, we should conclude that he did not organize the local camp.

With this condition of the record before us, it is insisted that the society had knowledge, through its agents Miller and Hume, of the impaired health and intemperate habits of the assured, and, therefore, the law of waiver and estoppel operates in favor of the appellee. We are not prepared to admit the knowledge of the society as contended, but, even though it had been shown to our satisfaction that Miller and Hume had this knowledge, the appellee, under the authorities and in view of the wilful

misrepresentations of the assured, could not benefit by the fact, for it is said in 2 Bacon on Ben. Soc. & L. Ins., 3rd ed., sec. 434-a, that:

“It is an elemental rule that where the means of knowledge are equal there can be no estoppel, nor can estoppel exist without some act of the party estopped misleading the other to his disadvantage.”

In *Ketcham v. The Am. Mut. Acc. Assn.*, 117 Mich., 521, 76 N. W., 5-6, the supreme court of Michigan said:

“The courts have always been anxious to take care of the rights of the assured when the applicant had relied upon the agent informing the company what had been truthfully told to him about the character of the risk; but the courts never have said the company is bound by statements contained in an application, when not only the agent, but the assured knows they are untrue, and calculated to deceive, and the application is to be forwarded to the company as the basis of its action. To so hold would put these organizations completely at the mercy of dishonest and unscrupulous agents.”

See, also, *Ins. Co. v. Fletcher*, 117 U. S., 519, 6 Sup. Ct., 837, 29 L. Ed., 934; *M. W. of A. v. Owens*, 130 S. W. (Tex.), 860; *Hexom v. Maccabees*, 140 Iowa, 41, 117 N. W., 19; *Kempe v. W. O. W.* (Tex. Civ. App.), 44 S. W., 688, 14 L. R. A. (N. S.), 280, note; *Bonewell v. N. Am. Co.*, 160 Mich., 137, 125 N. W., 61; *S. C.* on rehearing, 167 Mich., 274, 132 N. W., 1067, Ann. Cas., 1913A, 847; *Loftin v. Benev. Assn.*, 9 Ga. App., 121, 70 S. E., 353; *Mudge v. I. O. F.*, 149 Mich., 467, 112 N. W., 1130, 14 L. R. A. (N. S.), 279, 119 Am. St. Rep., 686; *Collins v. Co.*, 32 Mont., 329, 80 Pac., 609, 1092, 108 Am. St. Rep., 578; *Wilhelm v. Columbian Knights*, 149 Wis., 585, 136 N. W., 160; *McGreevy v. Nat. Union*, 152 Ill. App., 62; *Dimick v. Co.*, 69 N. J. Law, 384, 55 Atl., 291, 62 L. R. A., 774; *Maier v. Co.*, 78 Fed., 566, 24 C. C. A., 239; *Mattson v. Samaritans*, 91 Minn., 434, 98 N. W., 330.

It is intimated by counsel for appellee that Hume was influenced in soliciting the membership of the assured by reason of the fee attached, and from this they argue that if the society is thus dominated by a desire on the part of its officers for fees and salaries, the members of the society should pay such claims as the one here presented.

It is said by the supreme court of Washington in *Elliott v. Knights of the Modern Maccabees*, 46 Wash., 320, 89 Pac., 929-930, 15 L. R. A. (N. S.), 856, that, if a person colludes with an agent to cheat the principal, the latter is not responsible for the act or knowledge of the agent, for the rule which charges the principal with what the agent knows is for the protection of innocent third persons, and not those who use the agent to further their own fraud upon the principal. It is there held that, while notice to an agent is notice to his principal as a general rule, an exception to this rule arises when the agent's conduct is such as to raise a clear presumption that he will not communicate to his principal his knowledge of the fact in controversy, and where he acts in his own interests and adversely to those of his principal. In the case there under consideration the age limit for membership was fifty years, and Elliott informed the deputy commander that he was fifty-five years of age. The deputy asked him to state his age as of fifty years, and promised to secure his admission. The suggestion was acted upon, Elliott was admitted and remained a member of the tent until he had paid in dues the sum of \$348.00 and was entitled to certain returns under the rules. It was then discovered that he had misrepresented his age, the society canceled his membership; he sued to recover the above stated amount, and the court held that he and the agent were working for their own interests, and neither of them for the interests of the society, and denied his right to a return of the dues paid by him. See also *Ryan*

v. World Mut. L. I. Co., 41 Conn., 168, 19 Am. Rep., 490; *Hanf v. N. W. Masonic Aid Assn.*, 76 Wis., 455, 45 N. W., 315; 1 Enc. of Law, 2nd ed., 1144-1145.

However, we have found that there is no substantial evidence showing that the agent Hume had knowledge of the falsity of the statements. But, if we should concede his knowledge, it could not excuse the culpability of the assured, and the trial court should have granted the request of appellant for an instruction to the jury that it return a verdict for the defendant.

The foregoing conclusion is sufficient to dispose of this case, and we feel that it is unnecessary for us to go beyond this; but the case has been so ably and exhaustively argued on both sides, and so many authorities have been produced *pro* and *con*, and such persistent demands have been made in counsel's argument for a rehearing, that we feel constrained to present some of the points urged and authorities cited in support thereof, if for no other purpose than that the bench and bar may have the benefit of the researches of counsel.

It will be seen from a quotation from the application of the assured in the early part of this opinion that a policy should issue only upon the written statements, answers, warranties and agreements made in the application, and that no statements, promises, knowledge or information had, made or given by or to the person soliciting, taking or writing the application should be binding upon the society or in any manner affect its rights, unless such statements, promises, knowledge or information were reduced to writing and presented to the head officers of the society at or before the time any benefit certificate should be issued thereon, and that the certificate should be void if any of the statements contained in the application, which were made warranties *in toto*, should not be wholly true. This notice of the limited character of the soliciting or other agents of the com-

pany appeared in large type in the application immediately above where the assured signed the same, with a headline printed in large capital letters as follows: "APPLICANT WILL PLEASE NOTE THIS CLAUSE," thereby using every endeavor on the part of the society to bring the limited authority of the agents to the notice of the assured. Prior to March 29th, 1886, when the supreme court of the United States announced its opinion in the case of *New York Life Ins. Co. v. Fletcher*, 117 U. S., 519-536, 29 L. Ed., 934, 6 S. C. Rep., 837, on an application similar to the one under consideration, the courts showed a tendency to hold that the knowledge of the agent was the knowledge of the company, regardless of the attempts of companies to limit the authority of agents; and, with many courts, there seemed to be no discrimination made between the decisions cited from courts of states where the legislatures had specially provided that "persons soliciting insurance or procuring applications therefor should be held to be the agents of the insurance companies, anything in the application or policy to the contrary notwithstanding," as in the state of Iowa, Laws of 1880, Chap. 211, p. 209, and those where the general principles of agency only, without any statutory restrictions, were involved.

Justice Field, in writing the opinion in the *Fletcher* case, *supra*, disregarded all authorities where the agent's authority was not limited, and said that in cases where the agents were not limited in their authority they would be deemed as acting for the companies. but where the power of the agent was limited, and notice of such limitation given to the applicant in the application, which he was required to make and sign and which he must be presumed to have read, he would be bound by such limitation, and that there was nothing in insurance contracts which distinguished them in this particular from others. He further said that, if the assured had read even the

printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by the agent's verbal statements, unless reduced to writing and forwarded with the application to the home office; that the company, like any other principal, could limit the authority of its agents and thus bind all parties dealing with them with knowledge of such limitation; and that it must be presumed that the applicant read the application and was cognizant of the limitation therein expressed, when the notice was so clearly brought to his attention.

In *Iverson v. Met. Life Ins. Co.*, 151 Cal., 746, 91 Pac., 609-612, 13 L. R. A. (N. S.), 806, the supreme court of California had the same question under consideration, and held that, when a soliciting agent takes an insurance application in which it is stipulated that the answers of the applicant are true and are the basis of the contract of insurance; that, if untrue, the policy should be void; that only officers of the insurer had authority to determine whether a policy should issue; and that no statement made to the soliciting agent should be binding on the insurer, unless reduced to writing and presented to the officers of the company at the home office, the company would not be held liable on the policy issued on such application, unless informed as provided therein. In that case the agent of the company solicited an application from Iverson, whom he had known for over two years, and knew that he had suffered a stroke of paralysis, but this information was not communicated to the general agent of the company; the assured stated in his application that he never had paralysis, and the court declared the policy void, and held that, under the conditions of the application, the knowledge of the soliciting agent was not the knowledge of the company. It further held that an insurance company, like any other principal, could prescribe limitations upon the power and authority

of its agents, and persons dealing with such agents, with notice of the limitations upon their authority, are bound by the restrictions imposed; and that in the case before it the assured was plainly informed in the application that only the officers at the home office had authority to determine whether a policy should issue on the application, and that they acted on the written statements, answers, warranties and agreements contained therein in determining the matter.

In *Dimick v. Met. Life Ins. Co.*, 69 N. J. L., 384, 55 Atl., 291, 62 L. R. A., 779-780, involving the same questions of limitations of agencies as were considered in the Fletcher and Iverson cases, the court said the company certainly was at liberty to limit the powers and authority of its own agents, and third parties dealing with such agents, with express notice of the limitations thus imposed, could not bind the principal by any act done by the agents in excess of the bounds of their authority; that, if a similar question were raised concerning a contract relating to any other subject matter, not the slightest doubt would be entertained with respect to the binding force of the limitation; and, if persons seeking insurance, and insurance companies, are to be left free to enter into such contracts as they please with reference to life insurance, it is difficult to find any ground on which to ignore the force of these express stipulations, and, if there is any public policy requiring a rule different from that applicable to other subjects, it is for the legislatures, and not for the courts, to declare it.

See also, to the same effect: *Northern Assur. Co. v. Grand View Bldg. Assn.*, 183 U. S., 308, 22 Sup. Ct., 133, 46 L. Ed., 213; *McCoy v. Met. Life Ins. Co.*, 133 Mass., 82; *Clemens v. Sup. Assembly*, 131 N. Y., 485, 30 N. E., 496, 16 L. R. A., 33; *Rinker v. Aetna Life Ins. Co.*, 214 Pa., 608, 64 Atl., 82-84, 112 Am. St. Rep., 773; *Cleaver v. Ins. Co.*, 65 Mich., 527, 32 N. W., 660, 8 Am. St. Rep., 908;

Cook v. Standard L. & Acc. Ins. Co., 84 Mich., 12, 47 N. W., 568-571; *Ketcham v. Am. Mut. Acc. Assn.*, 117 Mich., 521, 76 N. W., 5, 6; *Modern Woodmen of Am. v. Tevis*, 117 Fed., 369-378, 54 C. C. A., 293; *National Union v. Arnhoist*, 74 Ill. App., 482-489; *Elliott v. Knights of the Modern Maccabees*, 46 Wash., 320, 89 Pac., 929-930, 13 L. R. A. (N. S.), 856; *Sun Fire Office v. Wich*, 6 Colo. App., 103-113, 39 Pac., 587.

Counsel for appellee, in their petition for a rehearing, contend that our supreme court, in the case of *Supreme Lodge K. of H. v. Davis*, 26 Colo., 252-259, 58 Pac., 595, decided the question of agency contrary to the conclusions which we here hold. We have re-examined the Davis case and are satisfied that the facts therein considered involved the ratification of the acts of an agent. The facts before us involve the power of an insurance company to limit the authority of its agents and bind the assured by bringing notice of such limitation to him in the application which he is required to sign. We have also carefully examined the cases of *McGurk v. Met. L. Ins. Co.*, 56 Conn., 528, 16 Atl., 263, 1 L. R. A., 563; *Coolidge v. Life Ins. Co.*, 1 Mo. App., 109, and 1 Bacon Ben. Soc. & Life Ins., sec. 160, authorities relied upon by our supreme court in the Davis case, all of which recognize the general rule that notice to the local agent of an insurance company, in making application for insurance, is notice to the company. The force of this general rule is not denied, and is not before us for consideration; but the question here presented is, as before stated, whether an insurance company can create an exception to the general rule by limiting the authority of its agents and giving notice of such limitation to the applicant in the application, which is part of his contract and which he is required to make and sign, as was done in that part of the application before us heretofore recited. Our supreme court, in the Davis case, made no pretense of con-

sidering such a question, nor are the authorities relied upon by it applicable to the facts before us. In the case of *Ryan v. The World L. Ins. Co.*, 41 Conn., 168-173, 19 Am. Rep., 490, cited with approval in the *Fletcher* case, *supra*, the supreme court of errors of Connecticut passed upon facts similar to those we are now considering, and held that such a limitation and notice was binding on the assured, and, in the case of *Ward v. Met. L. Ins. Co.*, 66 Conn., 227-240, 33 Atl., 902, 50 Am. St., 80, the same court distinguished the *McGurk* case, cited by our supreme court as an authority in the *Davis* case, and again recognized the exception which is here presented. 1 Bacon, sec. 160, relied upon by our supreme court, merely states the general rule, but, in a foot-note thereto, also recognizes the exception as follows:

“But when the policy limits the authority of the agent, there is no presumption that such agent communicated his knowledge to the company.”

Further, when the *Davis* case was being considered, the case of *Sun Fire Office v. Wich*, 6 Colo. App., 113, 39 Pac., 587, and also the *Fletcher* case, *supra*, had been decided, both recognizing the right of the insurer to limit the authority of its agents and bind the assured by giving notice of such limitation in the application which was made a part of the contract or policy, and no reference whatever was made to either of these authorities by our supreme court in the *Davis* case. From the painstaking industry and learning of the justice of our supreme court who wrote the opinion in the *Davis* case, it cannot be presumed that he overlooked or ignored the settled doctrine supported by the *Ryan* and *Ward* cases, the foot-note to sec. 160 of 1 Bacon, the opinion of our own court of appeals in the *Wich* case, or that of the United States supreme court in the *Fletcher* case.

But it is contended by appellee that our supreme court, in the case of *Pacific Life Co. v. Van Fleet*, 47

Colo., 401, 107 Pac., 1087, repudiated the doctrine of the *Fletcher* case and that we err in considering it as an authority here. A mere glance at the *Van Fleet* case will convince anyone that the facts there are essentially different from those in the case at bar, and that our supreme court distinguished the facts in that case from those in the *Wich* and *Fletcher* cases rather than repudiated the legal principles declared in the latter cases. The court expressed itself as follows:

“The *Fletcher* case is cited with approval by our court of appeals in the *Wich* case. The facts of these cases may be, in one or two important particulars, distinguished from the facts of the case at bar. But whatever may be said of their doctrine, we do not think they are controlling under the facts of this case, and we cannot apply their doctrine.”

In the *Van Fleet* case the soliciting agent of the company, who had power to solicit, prepare and transmit applications for insurance, filled in the blank spaces in the application and inserted therein answers which he knew to be false. The court said:

“It would seem that decisions of the supreme court of the United States of a later date than the *Fletcher* case, and certainly our own decisions, make the soliciting agent the representative of the insurer *when he makes out the application himself*, and his knowledge the knowledge of the defendant, and estop the company to declare the policy void *because of the mistake or fraud of its agent*.”

In the case at bar the soliciting agent, Hume, did not insert in the application the answers complained of. The false answers therein were made by the assured himself to the examining physician and written, as given, in the application by the examining physician, who was a stranger to the assured, and knew nothing whatever of his habits or the falsity of his answers. In this respect,

particularly, the *Van Fleet* case differs materially from the case at bar, and is in no way applicable to the facts before us.

It would seem that the learned justice who wrote the opinion in the *Van Fleet* case had some doubts as to the attitude of the United States courts toward the doctrines announced in the *Fletcher* case. However, the subsequent decisions of the United States courts have followed and applied these doctrines and very generally distinguished the *Chamberlain*, *Wilkinson* and *Fletcher* cases, as is shown in *Northern Assur. Co. v. Grand View Building Assn.*, 183 U. S., 308-358, 22 Sup. Ct., 133, 46 L. Ed., 213, wherein the *Fletcher* case is expressly approved, largely quoted from and followed; *Sawyer v. Equitable Co.* (C. C.), 42 Fed., 30; *Mutual Co. v. Robison* (C. C.), 54 Fed., 580-595; *Standard L. & Acc. Co. v. Fraser*, 76 Fed., 705, 22 C. C. A., 499; *Maier v. Fid. & Mut. L. Assn.*, 78 Fed., 566, 24 C. C. A., 239; *Hubbard v. Mut. Reserve* (C. C.), 80 Fed., 681; *Glover v. Nat. Fire Ins. Co.*, 85 Fed., 125, 30 C. C. A., 95; *Brown v. Casualty Co.* (C. C.), 88 Fed., 38-41; *U. S. Life Ins. Co. v. Smith*, 92 Fed., 503-507, 34 C. C. A., 506; *Caruthers v. Kansas Mut. L. Ins. Co.* (C. C.), 108 Fed., 487-494; *John Hancock L. Ins. Co. v. Houpt* (C. C.), 113 Fed., 572-576; *Modern Woodmen v. Tevis*, 117 Fed., 369, 54 C. C. A., 293, and *Phoenix Ins. Co. v. Warttemberg*, 79 Fed., 245-248, 24 C. C. A., 547.

In the *Warttemberg* case, *supra*, the circuit court of appeals clearly announced that the decision of the court in the case of *Insurance Co. v. Chamberlain*, 132 U. S., 304, 33 L. Ed., 341, 10 S. C. Rep., 87, did not attempt to modify the doctrine of the *Fletcher* case, and said that it was based expressly upon the statute of Iowa, in which state the contract of insurance had been made, providing that "any person who shall hereafter solicit insurance or procure applications therefor shall be held to be the soliciting agent of the company or association issuing the

policy on such application or on a renewal thereof, anything in the application or policy to the contrary notwithstanding.”

The court further said:

“We find no other decision of the supreme court subsequent to the *Fletcher* case which in any way modifies that case.”

It is rather surprising that anyone who read the *Chamberlain* case should have thought that such was intended, in anywise, to modify the *Fletcher* case. Justice Harlan, who wrote the opinion in the *Chamberlain* case, expressly stated that counsel upon one side insisted that the *Fletcher* case controlled, and counsel upon the other side insisted that other decisions of the United States supreme court controlled, and he held that the statute of Iowa controlled, and based the decision thereon, and anything he said in the previous part of the opinion about general rules is *obiter dictum* and not authority upon any question.

Justice Campbell, in the *Van Fleet* case, made no pretense of overruling the doctrine laid down in the *Fletcher* case, adopted by our court of appeals with approval in the *Wich* case, to the effect that it is competent for any party, corporation or individual, employing an agent in the negotiation of a contract, whether of insurance or otherwise, to limit his power, provided the limitation is brought home to the knowledge of the other contracting party, and, that in an insurance application, which the assured is required to sign, such notice may be brought to the attention of the assured therein.

In *Merchants Ins. Co. v. Harris*, 51 Colo., 109, 116 Pac., 143, our supreme court said “insurers should undoubtedly be allowed to protect themselves, in any legal way possible, against the fraud of their unfaithful agents, but not at the expense of innocent third parties. And when a loss caused by a dishonest agent must fall upon

his principal or a third party, both equally innocent, the courts should not, and do not, ordinarily, hesitate in putting the burden upon the person who selected and controlled the agent."

It would seem from the foregoing stated conditions that neither the facts nor decisions in the *Van Fleet* or *Harris* cases affect those parts of the *Wich* or *Fletcher* case which apply to the facts of the case at bar, if it was the intention of our court to repudiate anything decided in either of these cases, and we, therefore, regard them as authority herein.

We may say here that the authorities herein cited and examined by us support the following principles:

First, contracts of insurance are to be considered and construed, when not controlled by statute, by the same rules of law and interpretation as other contracts in order to carry out the intention of the parties.—*Merchants Ins. Co. v. Harris, supra*, 108.

Second, under the general principles of the law of agency, an insurance company, when not restricted by statute, is at liberty to limit the authority of its own agents, and an applicant dealing with an agent whose authority is so limited by the express terms of the application, which the applicant is presumed to read and required to sign, cannot benefit by any act done by such agent in excess of his authority so limited and declared.—*Dimick v. Met. L. Ins. Co.*, 69 N. J. L., 384, 55 Atl., 291, 62 L. R. A., 781-782; *Sun Fire Office v. Wich, supra*, 113-114, and other cases heretofore cited.

Third, if the people of any state wish to change the public policy thereof in insurance matters, by limiting the general rule of agency, it is for the legislatures, and not for the courts, to so change it.—*Dimick* and *Wich* cases, *supra*.

Counsel for appellee, in their petition and brief for a rehearing, also complain, because, they say, that the

authorities overwhelmingly show, in a case like this, that the company must plead and tender a return of the dues and assessments paid. We did not go into this question exhaustively, as it was not raised in the court below, nor in this court until after the case had been orally argued; and, under such conditions, unless it is necessary to prevent injustice from prevailing, the courts are not inclined to consider any questions which are so untimely presented. However, in our opinion heretofore announced, we did cite the case of *Elliott v. Knights of the Modern Maccabees*, 46 Wash., 320, 89 Pac., 929-930, 13 L. R. A. (N. S.), 856, wherein the assured defrauded the society, by collusion with the agent, in obtaining a policy, and paid \$348 in dues and assessments before the society discovered the fraud and canceled his policy or certificate. Upon action brought by him to recover the dues and assessments so paid, the supreme court of Washington held that, where the policy was obtained by fraud on the part of the applicant, or by collusion between the applicant and the agent, he forfeited all payments. In *Nat. M. F. Ins. Co. v. Duncan*, 44 Colo., 472-480, 98 Pac., 634, 20 L. R. A. (N. S.), 340, our own supreme court settled the question in this jurisdiction in the following language:

“Counsel for plaintiff also contends that the defense under consideration is insufficient because it does not allege that the company has repaid the premium or any part thereof to the insured. The company is not seeking to rescind its contract of insurance, but to avoid liability thereon because of the fraud of the insured. Where a policy by its terms is void by reason of fraud on the part of the insured, the premium cannot be recovered back.”

See also *Aetna L. I. Co. v. Hall*, 10 Ill. App., 431; *Freismuth v. Agawan M. F. I. Co.*, 64 Mass., 588; 2 May on Ins. (4th ed.), sec. 567.

The general rule is stated in a footnote to *Taylor v.*

Grand Lodge A. O. U. W., 96 Minn., 441, 105 N. W., 408, 3 L. R. A. (N. S.), 114, as follows:

“The general doctrine laid down by the text-book writers is that an unintentional breach of warranty on the part of the insured does not authorize a retention of the amount paid as assessments, if no risk has been run by the insurer; but actual fraud in the inception of the contract on the part of the insured forfeits his claim to a return of assessments notwithstanding the fact that no risk has ever attached. See 2 Cooley, Briefs on Insurance, pp. 1037-1048; Niblack, Accident Ins. & Ben. Soc., sec. 282; Vance, Ins., secs. 85, 86; Joyce, Ins., sec. 1406; Cooke, Life Ins., p. 193; 2 May, Ins., 3rd ed., sec. 567.”

In the case under consideration we have found that the policy or certificate was obtained by wilful misrepresentations on the part of the assured as to his intemperate habits, hence no such tender or pleading as is insisted upon by the appellee was required. Furthermore, we can find no direct evidence in the record as to the payment of any specific amount by the assured, but there are acknowledgments of the payment of whatever amounts that were necessary to admit the assured as a member, and, by consulting sec. 214 of the by-laws, we learn that the payment of a membership fee of at least \$5.00, together with the camp and head physician's fees, was required, and from this it is self-evident that the assured had invested but a very small amount for the certificate in question; and we feel, in view of the condition of the record before us, that we would be doing a great injustice to require the members of the appellant society to pay the judgment of \$3,190 rendered in the district court on a certificate that was evidently obtained by wilful concealment of material facts, and which could not have been secured if a truthful statement of the intemperate habits of the assured had been made, or if the society had known of the impaired health of the assured at the time the

certificate in question was issued, and when he accepted said certificate, April 5th, 1909, twenty-three days before his death, upon an express warranty over his own signature to the effect that he was then in good health and agreed that the same should not be binding on the society unless he was then in good health.

We think, upon the evidence, which was practically undisputed, that it was the duty of the trial court to give the instruction requested by the appellant directing the jury to return a verdict in its favor; hence, the judgment is reversed, the case remanded, and the district court directed to enter judgment for costs in favor of the appellant and dismiss the case.

Reversed and Remanded, With Directions.

HURLBUT and MORGAN, JJ., dissenting.

HURLBUT, J., dissenting:

If I properly understand the majority opinion, it reverses the judgment of the trial court principally upon the ground that the insured, Henry Conter, made false answers to questions propounded to him in his application for the certificate; that the record conclusively showed such answers to be false; and that, such being the case, the warranties and statements incorporated in Conter's application, as well as in the certificate itself, concerning answers made in the application, conclusively bar the beneficiaries from recovery in this action. It further appears in the opinion that the question of waiver on the part of defendant company received but passing notice, though such issue was pleaded and earnestly maintained by plaintiff throughout the controversy. I am of the impression that such waiver is the controlling and dominating issue in this case, and that every other point raised by the record is subservient to it. I think it cannot be gainsaid that issues similar to those determined by the court in the majority opinion have been presented

to the appellate courts throughout the country probably as often as any other kind or class of issues known to the law. Their determination has germinated a multitude of adjudicated cases throughout the various jurisdictions, and the same are in hopeless conflict upon the question of waiver and liability of insurance companies under policies and beneficiary certificates such as here considered. There can be no question but that the majority opinion is supported by numerous authorities of enviable repute, while, on the other hand, authorities of equal standing have construed the same kind of contracts as in the case at bar, and reached conclusions and rendered opinions in direct opposition to those here announced. The majority opinion and those authorities cited in support thereof appear to adopt an unvarying rule that in this class of cases every line, word and syllable, found in the policy or certificate, must be strictly construed and rigidly enforced in favor of the company, taking but scant notice of defenses of waiver generally pleaded and urged by the beneficiaries; while, on the other hand, those authorities which militate against the class just mentioned appear to grasp upon anything found in the record pertaining to the securing and issuing of the policy which would justify a ruling that the company had waived its right to insist upon the strict letter of the contract as against the beneficiaries, and thus prevent a forfeiture of the policy. I do not want to be understood, by the language used, as intimating that this court, or others entertaining the same views on a contract of this character, is actuated by any prejudice for or against insurance companies, their policy-holders, or beneficiaries thereunder. It is to be regretted that all life insurance policies and certificates of beneficiary companies are not short, and couched in brief and simple language, so that policy-holders or members could be justified in the belief (which they usually entertain) that their wives or chil-

dren, upon their death, would be the possessors of certificates of indebtedness equal in financial integrity to government bonds. In my judgment, it would challenge the ingenuity of the greatest living lawyer to draft an application or certificate containing more subtle, unreasonable and inequitable warranties, provisions and restrictions, against the insured, than those found in the printed application and certificate in the instant case. It is a safe suggestion, in view of the majority opinion, that but a small percentage of the million or more members of the appellant company have a clear conception of the uncertain protection afforded their wives and children under issued policies and certificates like those here considered. If there is anything in this criticism, it might be nullified if those courts holding the insured to the strict letter of the contract would require the insurance company, where the policy is being contested, to show that the attention of the insured, prior to the signing of the application and issuing of the policy, had been specifically called to the harsh and unreasonable provisions and restrictions against him contained therein. Many courts adopt this rule in contracts of passengers and shippers with common carriers, and its enforcement has resulted in great benefit to the public at large.

I am willing to admit that, while Conter stated in his application that he had never been intoxicated, and that he used intoxicants only to the extent of "an occasional beer," the undisputed evidence showed that at the time he signed his application, and for many years prior thereto, he had indulged extensively in the use of intoxicating liquors, and had been intoxicated a number of times; and, were there anything in the record to show that, at the time the certificate was issued, neither the company nor its agents or officers had any knowledge of Conter's habits in this regard, the company should not be held to liability in any amount upon the same.

The record here shows that Hume was the assistant deputy head consul of the order, and, while holding that position, came to Denver to organize the local camp at Globeville some time in January or February; that he appointed and employed Dr. Van Landingham to examine Conter for membership; that he discussed with the witnesses Miller and Newman the proposed organization of the local lodge, and the question of presenting members for that lodge, their qualifications, and particularly the qualifications of Conter for membership. It was admitted at the trial that Hume had authority to solicit members, take the documents examined, of whatever nature, and forward the same to the authorities, and, presumably, to employ physicians and direct them to make professional examination of proposed members. The record shows that the benefit certificate was issued by the head consul, and further shows his power to appoint assistant deputy head consuls and fix their compensation. Hume, therefore, being an agent created by the head consul, could not well be considered an agent or representative of the local camp, as the same was not in existence at the time he was engaged in the business of forming it. As he was the direct representative of the chief executive officer of the society at the time of his sojourn in Denver, all knowledge and information obtained by him, respecting the qualifications of proposed members for the new camp, ought to be taken as knowledge and information of the head consul and the order itself. His agency appears to have been of a much higher degree than that of one simply soliciting members for camps already established. It seems that the occasion of his visit to Denver at the time mentioned was for the purpose of creating the new camp, and seeing that it was properly established as required by the rules of the order. Certainly a mere soliciting agent is not generally empowered with authority to establish new camps, hire

physicians, and direct examinations of proposed members, as was done by Hume. Under this showing and under authority of *Supreme Lodge K. of H. v. Davis*, 26 Colo., 252, 58 Pac., 595, I think Hume was an agent of the order, and that knowledge and information concerning the qualifications of Conter for membership, acquired by him in the performance of his duties in that respect, is knowledge and information chargeable to the order, as well as to the head consul. It should also be presumed that Hume promptly notified the chief executive of the order at the home office of the objections urged by the witnesses Miller and Newman to Conter's becoming a member, as well as their reasons therefor. The same remarks may apply in regard to Hume's knowledge of any disorder or serious affection of Conter's heart at the time. It is undisputed that, in addition to the objection made by Miller to Conter's becoming a member of the order on account of excessive liquor drinking, he also objected to such membership by reason of his belief that Conter was afflicted with heart trouble to a degree making him an undesirable member. Miller was a druggist, and, by virtue of his occupation, more or less familiar with human ailments. These facts should have put Hume upon inquiry, and to a further investigation concerning such objections. I think, however, that whatever the answers of Conter might have been concerning the condition of his heart at and prior to the time of his application is of but little moment, as his answer that he had "never had any disease of the heart" was corroborated by the testimony of defendant's physician, Dr. Van Landingham. He testified that he made a careful examination of Conter's heart by modern, approved methods at the time of his examination, and failed to discover any trouble whatever therewith, and certified that he believed he was free from any heart trouble at that time. Certainly the evidence of an experienced physician upon this question

should be conclusive as against a layman's diagnosis of heart ailments. Here Conter's testimony was corroborated by the physician. In addition to this testimony, Dr. Lee, a witness, examined Conter about one month before he died to ascertain his physical qualification for membership in the Prudential Insurance Company, and passed him as a safe risk. All this undisputed testimony on this point ought to eliminate any question as to Conter's heart being sufficiently normal to admit of his membership in the order. The evidence is also undisputed that in January or February, 1909, and prior to the time the insured made his application for membership, the two witnesses, Newman and Miller, discussed with Mr. Hume, assistant deputy head consul of the order, the advisability of accepting insured as a member of the local camp, and both advised against it and gave as reasons that insured drank too heavily and was not a fit person by reason thereof for such membership, Mr. Miller further telling him that he thought insured's heart was in bad condition. It is therefore clear that for about six weeks before the membership certificate was issued Hume knew that insured was a heavy drinker, and that there was at least some question as to the condition of his heart. This knowledge was imparted to Mr. Hume while he was actively engaged in soliciting and considering the qualifications of proposed members for the new local camp at Globeville. From the majority opinion, I extract the following:

“The statement made by Miller to Hume that the assured drank too heavily, and the statement of Newman to Hume that the assured ‘was too much of a drinker, to (his) knowledge, for fraternalism,’ were vague opinions of the witnesses which did not necessarily conflict with the statements of the assured in his medical examination.
* * * They were mere hazy opinions bottomed on no facts disclosed in the record at least.”

I notice here that the testimony of Miller and Newman, concerning Conter's liquor drinking habits and heart condition, is designated in the opinion as "vague opinions of the witnesses" and "mere hazy opinions bottomed on no facts disclosed in the record at least." Miller testified as follows:

"I had a discussion with Mr. Hume over the organization of that lodge and the presentation of members for the lodge. I think I was one of the first men consulted by Mr. Hume as a prospective member. * * * During that conversation I discussed with Mr. Hume the advisability of securing the application of Henry Conter. I had known Conter something over a year. I told Mr. Hume he was not a desirable member for the organization. The reasons that I gave were that he drank too heavily and I thought his heart in bad condition."

Mr. Newman testified:

"I worked with him (Hume) soliciting members for the Modern Woodmen. I had a discussion with him about taking the application of Henry Conter for membership in the Modern Woodmen. * * * The reason I gave for not writing him up was that he was too much of a drinker for fraternalism."

I am at a loss to discover wherein this positive, plain and unambiguous information given by Miller and Newman to Hume should be designated as "vague and hazy opinions of the witnesses." Both were relied upon by Hume for other information in obtaining members. One of the informants was a reputable merchant, and both had known Conter for years, were his neighbors and intimate acquaintances. Who else but the neighbors and associates of Conter could have given reliable information upon the subject? Where could Hume have applied, and to whom, with a hope of securing more reliable information concerning Conter's qualifications for membership? Who but a neighbor or intimate acquaintance

of Conter could have given information concerning the subject more entitled to credence? Who but a neighbor or intimate acquaintance would be more likely to know the habits and general physical condition of Conter? Where is there anything vague or hazy about these statements of Miller and Newman? It is a fair presumption that the very subject matter of the conversation was one of great importance to this company, and can safely be presumed to have been material to the risk. Here was the direct representative of the highest executive officer of the company, strictly in the line of his duty, personally seeking information of divers persons which would qualify or disqualify a prospective member for membership under the rules of the order. No other person but Hume, as shown by the record, was authorized at that time to speak for the general order or head officers thereof, or transact any business for or in their behalf. He was their sole and only representative present, at and about that time, with any power to organize a constituent branch or camp and pass upon the qualifications of the proposed members. He was told plainly and unequivocally that Conter was not a good risk; that he would be objectionable as a member of the proposed camp, for the reason that he indulged to excess in the use of intoxicating liquors; and that it was Miller's belief that his heart was not in good condition.

The court further says: "In our opinion, under the condition of the record, no rule of ordinary diligence required the appellant to pursue its investigation beyond the medical examination." I take issue with the court in this statement. It would seem hard to imagine a situation making it more imperative for an agent or one interested to seek further information upon a subject than the one here disclosed. This conversation took place at Globeville, a small suburban settlement of Denver, and if Hume doubted the veracity or good faith of either Miller

or Newman he could easily have interrogated other merchants and members of that community and satisfied himself to the fullest extent of Conter's qualifications to become a member of the camp. These statements of facts by Miller and Newman were not mere idle passing comments upon Conter's habits and physical condition, but important facts elicited by Hume in deciding who would be acceptable members for the local camp. It was the subject, and the only subject, under consideration at the time. The conversations were between Hume on the one part and an existing member of the order and a prospective member of the camp to be organized on the other. Prospective members and their qualifications were the controlling subjects of the conversations, and it was strictly business of the order in which Hume was engaged. From any standpoint from which the situation may be considered, it is a reasonable view that it was the duty of this assistant deputy head consul, if governed by motives of integrity and real interest in the good of the order, to have, immediately upon receiving this information, positively rejected Conter as a prospective member of the camp, and to have seen to it that his application was not considered or received for the purpose of becoming such member; or, if he had declined to take such action, under a belief that the information he received was not entirely reliable or was subject to doubt, the only honorable thing left for him to do was to investigate further and continue his investigation until he was satisfied of the real character of Conter concerning his liquor-drinking habits and physical condition; indeed, I think he should have gone further and written at once to the head office at St. Louis and informed them that Conter was not qualified to become a member of any camp of that order. He occupied a position of great trust and importance in the order, as compared with an ordinary soliciting agent who might be in the employ of the order

today and gone tomorrow. The order should not be permitted to escape liability under the circumstances shown, by reason of the warranties and conditions contained in the application and certificate. As a matter of law the order should be held to have waived any warranty or condition contained in those documents, under the facts here shown.

As to the warranty to the effect that this information, acquired by Hume during these conversations with Miller and Newman, should have been reduced to writing and placed in the hands of the head officers before the certificate was issued, I believe this knowledge was in law the knowledge of the head officers, who were thereby presumed to know what Hume knew. The fact that such knowledge was not in writing should be held immaterial. Had Hume performed his duty, as I view it, he would have written at once to the head officers, as above suggested, informing them of Conter's disqualifications.

In the case of *Supreme Lodge K. of H. v. Davis, supra*, our supreme court had under consideration a defense interposed to an action upon a beneficiary certificate upon the ground that the insured, at the time he made his application for membership, falsely stated his age. The uncontroverted evidence there showed that in May, 1890, after the membership certificate had been issued, the beneficiary notified the reporter of the local lodge that the age of insured was greater than represented by him when he became a member, but after such notification the assessments thereafter becoming due for May and June were received and retained by the lodge. The supreme court held that under the circumstances the order could not escape liability by reason of the false representation as to age, and that such defense was waived by accepting and retaining the two assessments mentioned, after it became aware of such falsity. Jus-

tice Gabbert, speaking for the court, used this language, viz.:

“A material, wilful misstatement of an applicant for membership in the order regarding his age would doubtless vitiate the contract of insurance if not known by the lodge or its officers to whom applications for membership are addressed. * * *

“It will also be presumed that he (the agent) has communicated all information to the order which he obtains in the discharge of his duties in making collections on its behalf which affects its rights; or, if he has not, still the order having intrusted him with the particular business, the member paying his assessments to him has the right to deem his acts and knowledge those of the order. * * * Appellant could not continue to collect assessments after knowledge of misstatements regarding the age of deceased which would affect its rights, and then, when the contract is executed, escape liability upon the ground that he was guilty of a fraud in procuring his insurance; and the financial reporter of the subordinate lodge of which deceased was a member, having received his assessments after notice of alleged misrepresentations regarding his age, and being an agent of the order for the purpose of making those collections, the knowledge which he then had regarding the age of deceased, or his misstatements on that subject, was the knowledge of the order (*McGurk v. Met. L. I. Co.*, 56 Conn., 528, 16 Atl., 263, 1 L. R. A., 563; Bacon's Benefit Societies, sec. 160; *Coolidge v. Life Ins. Co.*, 1 Mo. App., 109), and its acceptance and retention of these assessments, with that knowledge, is a waiver of its right to now raise any question on that subject; and, therefore, whether the evidence sought to be introduced by appellant, regarding the age of Davis, was competent or incompetent, it is not necessary to determine, for, according to the admitted facts, it was precluded from asserting

that defense in this action.—Niblack's Benefit Societies, pp. 565, 566; *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va., 622, 52 Am. Rep., 227; *Watson v. Centennial Mut. Aid Assn.*, 21 Fed., 698; *Ball v. Granite State Association*, 64 N. H., 291, 9 Atl., 103; *The Masonic Benefit Assn. v. Beck*, 77 Ind., 203, 40 Am. Rep., 295."

In that case the benefit certificate contained a statement to the effect that the statements made in the insured's application for membership, and those made by him to the medical examiner, were to become part of the contract. It will be noticed that the knowledge of the false statement made by the insured, concerning his age, did not come to the society until after the policy had been issued and delivered. In the case at bar the falsity of the statements of the insured, concerning his intemperate habits, was known to both the assistant deputy head consul and Miller (who afterwards became clerk of the local camp) before the benefit certificate was issued. Such knowledge was possessed by them before Conter filed his application for membership.

It may be well at this time to notice that the witness Miller was one of the charter members of the local camp, and elected clerk thereof when it was organized. He had full knowledge of the extent to which Conter used intoxicating liquors, as well as the possibility that his heart might be affected. This knowledge should be considered knowledge of the local camp, which knew that Conter was one of its members. The record does not show any correspondence between the local camp and the home office concerning Conter's disqualifications, or any objection to Conter remaining a member of the camp.

Many reputable courts, including those next hereinafter cited, hold in cases of this kind that the local lodge or camp bears the relation of agent to the parent organization, with reference to the business transacted at the place where the local camp is situated.—*Order of Colum-*

bus v. Fuqua (Tex. Civ. App.), 60 S. W., 1020; *M. W. A. v. Breckenridge*, 75 Kan., 373, 89 Pac., 661, 10 L. R. A. (N. S.), 136, 12 Ann. Cas., 636; *Knights of Pythias of the World v. Bridges*, 15 Tex. Civ. App., 196, 39 S. W., 333.

The appellant, in so far as the insurance features of the organization are concerned, is in effect a mutual life insurance company, and the general rules governing associations of that character control it in the transaction of this branch of its business.—*Chartrand v. Brace*, 16 Colo., 19, 26 Pac., 152, 12 L. R. A., 209, 25 Am. St. Rep., 235; *Supreme Lodge K. of H. v. Davis, supra*; *Titus v. G. F. Ins. Co.*, 81 N. Y., 410.

On the question of waiver, defendant received the initiation fees, dues, etc., from Conter, and accepted him into full membership of the order after complete knowledge of his false answers touching his liquor habits. This should be sufficient to estop the company from insisting on forfeiture. In law, the head officer (head consul) possessed this information before the certificate was issued, by reason of the fact that his appointee and representative, Hume, was fully informed of the same. In *Prudential Ins. Co. v. Hummer*, 36 Colo., 208, 84 Pac., 61, the supreme court re-submitted the case on the question as to whether certain warranties made by the insured, in his application, concerning his health, were or were not true, and, if untrue, whether or not the company, *by estoppel or waiver*, was precluded from relying upon such false statements as a defense to the action. See *Shotliff v. M. W. A.*, 100 Mo. App., 138, 73 S. W., 326; *Order of Columbus v. Fuqua, supra*; *M. W. A. v. Breckenridge, supra*; *M. W. A. v. Colman*, 68 Neb., 660, 94 N. W., 814, 96 N. W., 154; *Biermann v. G. M. L. I. Co.*, 142 Iowa, 341, 120 N. W., 963. In the last cited case the facts are similar to those in the case at bar. The court says:

“It is true the defendant made a strong showing to the effect that the deceased was greatly addicted to the

use of intoxicants, or, as put by some of the witnesses, was a drunkard at the time the policy was applied for; but it is equally apparent that appellant had notice and knowledge of the truth in this respect when it accepted the application and entered into the contract. The appellant had a local office in Marshalltown where the deceased lived, and was evidently a well-known character. An agent in charge and several sub-agents or soliciting agents worked in and about the city and vicinity. The soliciting agent who took the application of the deceased knew of his drinking habits. When the insurance was being negotiated, it was a subject of conversation between the several agents of the appellant in the city as to the doubtful insurable condition of the deceased because of his habits. The application itself discloses his habits, to some degree at least, for, while saying that the applicant did not use malt or spirituous liquors 'to excess,' it further informs the company that he did take 'a glass of beer occasionally.' This was a sufficient disclosure to suggest to a discreet person the advisability of further inquiry if the subject was one deemed of vital importance.

* * * Under such circumstances, the fact that the warranty was broken when made constitutes no defense."

In *Collver v. M. W. A.*, 154 Ia., 615, 135 N. W., 67, the action was against the same company which is appellant here, and the by-laws and warranties pertaining to the contract are practically the same in both cases, except that the warranty requiring information to be in writing and submitted to the head officers is not mentioned in the *Collver* case. The court there held the company to have waived the conditions of the certificate by receiving assessments from the member after knowledge of his intemperance subsequent to the issuing of the certificate. See also *Thomas v. M. B. A.*, 25 S. D., 632, 127 N. W., 572; *Miller v. M. B. L. I. Co.*, 31 Ia., 216, 7 Am. Rep., 122. In the latter case the court held that the

knowledge acquired by a soliciting agent in the line of his duty is knowledge of the company he represents, the court saying:

“To this latter view the judicial mind seems rapidly tending, and it is certainly more in accord with the enlightened and progressive spirit of the age. These companies select their own agents, require them to enter into bonds for the faithful discharge of their duties, and send them forth provided with blanks and clothed with all the insignia of authority. If their ignorance or their cupidity leads them to recommend improper risks, it is more in consonance with reason that the loss should be borne by the company than that the assured should be made the victim of the incompetency or the avarice of the agents. More especially is this true in view of the fact that the company has the means of indemnity through the bond of the agent. Just principles of public policy require that these companies should be held to a strict degree of responsibility for the acts of their agents. They will thus be led to the exercise of greater circumspection in the selection of agents. * * *

“It is quite true that the technical constructions which have pertained with reference to contracts of this kind, blocking the pathway to justice, and leading to decisions opposed to the general sense of mankind, should be abandoned, and that these corporations, grown opulent from the scanty savings of the indigent, should be held to the same measure of responsibility as is exacted of individuals.”

Kausal v. M. F. M. F. I. A., 31 Minn., 17, 16 N. W., 430, 47 Am. Rep., 776; *Garfinkel v. Alliance Life Ins. Co.*, 140 Ill. App., 380; *Pringle v. M. W. A.*, 76 Neb., 384, 107 N. W., 756, 113 N. W., 231.

Innumerable cases in addition to those already mentioned could be cited which are in harmony with them,

but no good purpose can be accomplished by further extending the list.

The evidence appears to be undisputed that Conter's death was caused by fatty degeneration of the heart, but I find nowhere in the record any testimony showing that the intemperate use of liquor directly or indirectly caused his death. The testimony of the physicians goes no further than to show that the intemperate use of liquor is one of the primary causes of fatty degeneration of the heart. But nowhere do they intimate that Conter's death resulted from intemperate drinking. Dr. Bennett, a witness, testified that he assisted in performing the autopsy on the body of Conter, and stated:

"The only cause of death of Henry Conter that I could determine, assisting Dr. Carlin, was fatty degeneration of the heart. There may be many causes of fatty degeneration of the heart. A person that has lived a careful life, through no fault of their own, may be subject to it and die from it, and persons leading careless lives will be more subject to it. * * *

"Many causes may contribute to it. The torpidity of the liver, poor circulation, a bad digestion, and all these things which tend to upset the heart."

The claim by appellant that Conter's death was caused indirectly by intemperate drinking is entirely wanting in proof to sustain it.

Appellant contended that the certificate was forfeited by Conter's false answer to the question, "Do you use intoxicating liquors daily?" to which he answered, "No." This issue was fairly left to the jury, and is presumed to have been decided in favor of plaintiff.

Another point urged by appellant is that the certificate was forfeited by the alleged false answer given to the question, "Have you within the last seven years been treated by or consulted any person, physician or physicians, in regard to personal ailment?" to which question

Conter answered, "No." This was another issue presented by defendant as a defense, upon whom the burden was placed to establish the same by a preponderance of the evidence. In my judgment, considering the testimony in the light most favorable to defendant, sufficient proof was wholly wanting to establish that defense. Miller testified on this point as follows:

"He (Conter) bought some strychnine tablets from me on one or two occasions. * * * To my knowledge he at no time said anything to me about affliction of the heart, nor that his heart was acting badly. We (Conter and witness) were in the store one day and he (Conter) complained of dizziness. * * * I suggested to him his stomach was out of order and it might be a good idea for him to take a few strychnine tablets. Prior to that time I noticed Mr. Conter's complexion, and I thought he did not have a very strong heart, but did not care to say anything to him. * * * Later on he came in and bought strychnine tablets.

"Q. You gave him those strychnine tablets believing yourself from the observation you had made of his condition that it was caused by trouble of the heart?

"A. Not necessarily. I did not know whether that was why he bought them or not.

"Q. I am asking you why you gave him the strychnine tablets.

"A. I gave them to him because he wanted them.

"Q. No, but you said he became dizzy and you thought his heart was in trouble.

"A. I did not tell him that. I said I thought so."

This certainly does not show that Miller was treating Conter for heart trouble or had any settled conviction that he had heart trouble. The evidence entirely fails to show that any physician or other person treated Conter for any heart trouble whatever.

I have no criticism of the rule as stated in the ma-

majority opinion to the effect that insurance companies generally, and their policy and certificate holders, are at liberty to enter into any contract they desire, not prohibited by law, and that it is the duty of courts to enforce such contracts as they find them. At the same time I know of no law or rule that prohibits a party to a civil contract from waiving warranties or conditions inserted therein for his own benefit. When such waiver is satisfactorily shown, the party so waiving is estopped from pleading or insisting upon forfeiture of the contract. I think in this case the company *did* waive the warranties and conditions contained in the application and certificate; that the knowledge of Hume, concerning Conter's disqualification for membership in the order, by reason of his liquor habits, was, under the facts disclosed by the record, knowledge of the head officers of the company; and that receiving from Conter all fees and dues chargeable to him as a member, and issuing to him a full certificate of membership, after such information, ought to, and should, be taken as a waiver on the part of the company of such warranties and conditions.

In the consideration of this case, and in searching authorities, I am forcibly impressed with the fact that the printed reports of the several states are honeycombed with cases wherein this appellant appears as a party, and seemingly has felt itself called upon with deplorable frequency to protect its treasury from the "attacks" of widows and orphans of deceased members, which members in their simplicity have indulged the belief that in case of death the silent certificates held by them spelled comfort, sustenance, education and support, to those most cherished and loved by them.

It appears to me that the majority opinion in effect suggests to every association of this character that it is neither its legal nor moral duty to exercise any caution or discrimination in selecting agents to secure members

or transact its business, and that it need not concern itself as to the probity or veracity of such agents. The direct result of the opinion places the entire responsibility of an agent's dishonesty or derelictions upon the insured, or, more unfortunately, upon the innocent beneficiaries. By inserting in policies a warranty, such as here found, requiring written notice to head officers, etc., all consideration by the company of an agent's honesty or veracity becomes useless and unnecessary.

I think the judgment should be affirmed. I am authorized to say that Judge Morgan concurs in this dissent.

Decided July 14, A. D. 1913. Rehearing denied December 8, A. D. 1913.

[No. 3723.]

LITHGOW ET AL. V. PEARSON.

1. **STATUTES—Construction.** The statutes of eminent domain are to be strictly construed. They pass only such estate or interest in the lands as is reasonably necessary to accomplish the purpose had in view in the condemnation proceeding.

2. **EMINENT DOMAIN—Title Acquired—Effect of Abandonment.** Where, in condemnation proceedings, the final order, under Rev. Stat., sec. 2420, authorizes the petitioner to take hold, etc., the premises described, "for railroad purposes," a mere easement or terminable fee is acquired. When the land is no longer used for the public purpose specified, the right so conferred reverts to the former owner, or his successor in interest.

The provision of Rev. Stat., sec. 2431, that the owner shall receive "the full and actual value," does not affect the result.

3. **EVIDENCE—Presumptions.** There is no presumption that those who assume to convey lands as the heirs of a decedent are, in fact, such heirs. Whoever claims under the conveyance has the burden of establishing their character as such.

Appeal from Denver District Court. HON. GEORGE W. ALLEN, Judge.

Mr. THOMAS B. STUART, Mr. CHARLES A. MURRAY for appellants.

Mr. HALSTEAD L. RITTER for appellee.

CUNNINGHAM, Presiding Judge.

In the view we take of this case it is only necessary to determine one of the contentions debated in the briefs and on oral argument, viz.: whether or not, under the statutes of our state, a right of way acquired by a railroad corporation by condemnation reverts to the original owner of the fee upon the same being abandoned by the corporation. Wherever the word "abandonment" appears in this opinion, we use it in the sense that the condemnor acquiring title to the land by condemnation for a public purpose has ceased to use it for such purposes. It is not necessary, and we shall not attempt, to carefully or fully state all of the facts presented by the record in this case. It is sufficient to say that the appellee, Bear Pearson, and the two appellants, were made defendants in a condemnation proceeding brought by the city and county of Denver for the purpose of acquiring a right of way for a street over certain lots in which the two appellants owned an interest, and in which the said Pearson claimed an interest, by virtue of certain quit claim deeds. Long prior to 1909, when the city filed its petition in condemnation, the Denver Circle Railroad Company had condemned a right of way across the lots which, after the road had been operated for a time, was abandoned and the tracks taken up, and for many years before the proceeding brought by the city, no attempt had been made by the railroad company or any successor to use the old railroad right of way for public purposes of any sort. After the abandonment of the right of way by the railroad company, by certain *mesne* conveyances Pearson became vested with whatever title, if any, the railroad company had at the time of said conveyances, to the narrow strip

of land which it had acquired by the early condemnation proceeding. If upon the abandonment of the right of way by the railroad company the title reverted to the fee owners, then Pearson had and has no title whatever, and the judgment must be reversed. Appellants urge other reasons than that of reversion to defeat any claims that Pearson might have in and to the land, but it is not necessary, in the view we take, to refer to them.

The right of way which the railroad company originally condemned was embraced within the much wider strip which the city sought to and did condemn for a street. The condemnation proceeding brought by the city resulted in a decree or order awarding it title to the entire strip which it sought to condemn for street purposes, and the controversy here between the appellants and the appellee is over the distribution of the money which the city has paid in to the clerk of the court, appellants contending that Pearson has no title whatever, and that the whole amount should be paid over to them, while Pearson contends that he owned, by reason of the conveyances aforesaid, the old railroad right of way, and, therefore, is entitled to participate in the fund paid in to the registry of the court by the city.

The eminent domain statutes, and the provisions of the constitutions of the various states on that subject are far from uniform. Whether or not the legislature of a state (there being no restriction in the constitution) possesses authority to provide for the taking of an undeterminable fee title to land in a condemnation proceeding is a question which we are not called upon to determine. The authorities are not entirely harmonious on this point, but the doctrine that eminent domain statutes must be strictly construed is pretty uniformly adhered to in all the states.—15 Cyc., 1018; 10 Am. & Eng. Enc. of Law (2nd ed.), 1068; *Pueblo v. Rudd*, 5 Colo., 272.

Section 2420, R. S., provides that after the value of

the land in a condemnation proceeding shall have been determined by certificate or verdict of a jury, the court or judge "shall make and cause to be entered in the minutes a rule describing such lands, real estate or claims, in manner aforesaid, such ascertainment of compensation, with the mode of making it, and each payment or deposit of the compensation as aforesaid, a certified copy of which shall be recorded and indexed in the recorder's office of the proper county in like manner and with like effect as if it were a deed of conveyance from the said owners and parties interested to the proper parties. Upon the entry of such rule the said petitioner shall become seized in fee except as hereinafter provided, of all such lands, real estate or claims described in said rule as required to be taken as aforesaid, and may take possession of and hold and use the same for the purposes specified in said petition * * * Provided any such right of way shall never give the petitioner any right, title or interest in any vein * * * existing in the premises condemned."

The controversy here, it will be readily perceived, turns upon the nature or character of the title which the condemnor acquired under the statutory provisions just quoted. If, as appellee contends, the title vested by the decree of the court is a fee simple absolute, then, of course, the doctrine of reversion cannot be invoked by appellants. But if, as appellants contend, under the language of our statute the decree of the court vests but a qualified, or, more accurately speaking, a terminable fee, then, upon the abandonment of the right of way, the condemnor and its successors lost whatever title they had, and it reverted to the original owners. It is said by counsel for appellee that no Colorado case has so far squarely decided whether, under our statutes, the condemnor takes a fee simple absolute title, or a terminable fee. With this statement we are disposed to agree. However, there

are, as we think, helpful intimations in various cases that have been before our courts of review. The opinion in *Great Western Ry. Co. v. Ackroyd*, 44 Colo., 454-6, 98 Pac., 726, upon a casual reading, might seem to sustain the contention made here by appellee, but we think a more careful reading will disclose little, if any, support for his view, and the same may be said of *Colorado Central R. R. Co. v. Allen*, 13 Colo., 299, 22 Pac., 605, cited and relied upon by appellee. In *St. Onge v. Day*, 11 Colo., 368, 18 Pac., 278, a case that was before the supreme court commission, and examined and adopted by the supreme court, there are intimations which at least tend to support the views advanced by appellants. On page 371 appears the following:

“A railway right of way, as a general rule, necessarily carries with it an exclusive right *for railway purposes.*” [Italics ours.]

And, lest this qualifying phrase was not a sufficient warning to the bar, the court further said:

“It should not be inferred from what has been said that the railway company has the right to burden the property with any other or different use than that for which it was granted or acquired.”

But the applicability of the opinion in the *St. Onge* case is made doubtful by the fact that the right of way there under consideration was a congressional grant to the railroad company, which, we believe, is never held to convey the fee.

In *Smith Canal or Ditch Co. v. C. I. & S. Co.*, 34 Colo., 485, 82 Pac., 940, 3 L. R. A. (N. S.), 1148, Mr. Justice Campbell, speaking for the court, uses this language:

“The petition in the condemnation proceeding says that the land sought to be taken was for a right of way for a ditch, and in its complaint here plaintiff states that in such proceeding it procured and obtained *a right of*

way, and its estate in this strip is thus designated more than once."

By italicising the words "right of way" it is apparent that Justice Campbell regarded them as significant. While Justice Campbell was speaking of what the petition in the *Smith Canal* case contained, the statute under which the proceeding in the instant case was brought also uses the phrase "right of way." Proceeding, Justice Campbell says:

"Possibly it is not necessary that the rule itself should so provide, and the order here which was entered by the probate court did not purport to specify the title or interest which the petitioner sought to acquire. The language quoted is susceptible of the meaning that two sorts of estates are contemplated—one a fee, the other a mere right of way or easement. It is also susceptible of the meaning that the kind of a fee contemplated is *not a technical fee*; for, by reason of the words following, the word 'fee' is merely an estate or interest which gives to the party seeking to condemn the exclusive right of possession of the strip sought to be held during its continuance as a corporation, only for the purposes of constructing and operating a ditch; if so, an easement or mere right of way would satisfy that purpose. *Considering the statute, then, as we should, as passing only such estate or interest as is reasonably necessary to accomplish the purpose in view*, and bearing in mind that the petitioner asked only for a right of way, and taking the construction which in its complaint the plaintiff itself has made of its own right, we are of opinion that merely a right of way or easement was acquired, and such, we hold, is the extent of the plaintiff's interest in this strip." [Italics ours.]

Four things would seem to appear from the last quotation from the *Smith* case: (1) That the supreme court regards the phrase, "right of way," as ordinarily

meaning an easement, and where the phrase, "right of way," is used, it may well be held to indicate that the condemnor was not seeking or taking a fee; (2) that the word "fee" is not always used in a technical sense; (3) that it is the duty of courts in construing eminent domain statutes to hold, wherever possible, that they are intended to pass only such estate or interest as is reasonably necessary to accomplish the purpose which the condemnor has in view; (4) that the construction which the petitioner has, in his complaint, placed upon his own right, or the fee which he seeks, is, if not controlling, at least entitled to consideration. It is true that the statute which Justice Campbell had under consideration in the *Smith Canal* case was the act of 1868, while section 2420, which we are here considering, was passed in 1872, yet it is not thought that the dissimilarity in the phraseology of the two acts is sufficient to make wholly inapplicable the announcements made in the *Smith Canal* case, to which we have already directed attention. The petition of the Denver Circle Railway Company in the condemnation proceeding which eventuated in the vesting of title in that corporation to the land here in dispute was not introduced on the trial of the case, but the decree rendered in favor of the railroad company contained the following language:

"It is further ordered that the said petitioner may take, retain, hold and use the said above described land specified in said petition, to-wit, *for rail-*

we have quoted from the decree it may be seen that in its petition The Denver Circle Railway Company voluntarily limited (if the statute did so limit) the purposes for which it sought to use the land and take the title. At all events it appears to have given it title, "*for*" only, and it could not convey a higher

title than it received; that is to say, it could not strengthen or add to the title by any mere words of conveyance in a deed made to a third party. If a mere easement or a terminable fee (which, if not the same thing, have many characteristics in common) was all that passed to The Denver Circle Railroad Company in the condemnation proceeding, then all of the authorities agree that the land reverts, upon the condemnor ceasing to use it for public purposes.

It is true that section 2420 announces: "Upon the entry of such rule the said petitioner shall become *seized in fee*, except as hereinafter provided," but, following the phrase, "seized in fee," and in the same sentence in which it occurs, we find the following: "And it may take possession of and hold the same *for the purposes specified in said petition*." This, we believe, is equivalent to saying that the petitioner may not take possession of and hold and use the land for any other purpose than that specified in the petition which the decree, as we have seen, states was "for railroad purposes." The maxim *expressio unius est exclusio alterius* here applies. At least, it is no violent stretching of the rule of statutory construction to so hold, and under the announcement made in the *Smith Canal* case, as to the duty of courts in interpreting statutes of this sort, we believe it is our duty to so construe this statute. The whole case of appellee is predicated upon the words, "seized in fee," which appear in the act, and to which we have already directed attention. The authorities clearly indicate that technical terminology cannot be permitted to conclusively determine the character of the title which passes in a condemnation proceeding. As we have already pointed out, Justice Campbell, in the *Smith Canal* case, intimates as much, and there is ample authority directly in point sustaining this view.

In 2 Wood on Railroads (1894), sec. 245, p. 898, it is said:

“The question as to the character of the estate authorized to be taken is to be determined more in reference to the nature of the use to which the land is to be devoted than from the use or omission of technical terms; and either the presence or absence of the words, ‘in fee simple,’ is not decisive of the character of the estate, although the language of the act has an important bearing upon the legislative intent in this respect.”

And, on page 899, Mr. Wood says:

“But it will not be presumed that the legislature intended that a greater estate should be taken than is necessary for the purpose for which the power is conferred.

* * * As to railroad companies, it is generally held in this country that to lands taken for their use in the construction of their railroads they do not, in the absence of an express provision to that effect in their charter, take the fee, but only an easement therein, the fee remaining in the owner and reverting to him when the use thereof for such purpose ceases, and its interest in the land is withdrawn.”

Elliott on Railroads (1907), vol. 2, sec. 972; Mills on Eminent Domain (1888), sec. 317; Randolph on Eminent Domain (1894), secs. 213-216-221; *Abercrombie v. Simmons*, 71 Kans., 538, 81 Pac., 208, 114 Am. St. Rep., 509, 1 L. R. A. (N. S.), 806, 6 Ann. Cas., 239; *Smith v. City of Minneapolis*, 112 Minn., 446, 128 N. W., 819; *Fairchild v. St. Paul*, 46 Minn., 540, 49 N. W., 325.

In *Abercrombie v. Simmons*, *supra*, the supreme court of Kansas ruled that:

“An instrument in form a general warranty deed conveying a strip of land to a railroad company for a right of way does not vest an absolute title in the grantee. The interest conveyed is limited by the use for which the land is acquired, and upon the abandonment

of the use the property reverts to the adjoining owner."

It is not necessary in the instant case for us to go so far as the rule announced in the *Abercrombie* case. We simply cite it as showing the tendency of the courts. Counsel for appellee calls attention to section 2431, R. S., which provides that:

"In estimating the value of all property actually taken, the true and actual value thereof at the time of the appraisement shall be allowed and awarded, and no deduction therefrom shall be allowed for any profit to the residue of said property; * * * that in all cases the owner or owners shall receive the full and actual value of all property actually taken."

and he insists that it is unjust and inequitable (and therefore the legislature cannot be held to have so intended) to allow the owner of land, by the doctrine of reversion, to recover back that for which he has been fully compensated. At first blush one is disposed to concede the soundness of this contention, but the authorities appear to attach but little if any importance to this feature. The presumption always is that the condemnor is taking the land with the view of devoting it permanently to a public purpose; that the railroad or institution thus acquiring title by condemnation will be perpetuated. It is only upon this assumption that corporations have a right to meddle in the private affairs of citizens and interfere with private titles. Courts, in many instances at least, have declined to instruct juries that they may take into consideration the possibility of the reversion of the title in fixing the damage that should be allowed to the owner of the fee, and this, too, in states where the doctrine of reversion is firmly established.

"While the right of way for a railroad condemned under the statute is an easement and the fee remains in the owner of the land condemned, yet it is not proper to so instruct the jury in an appeal from condemnation pro-

ceedings unless it is made to appear that the fee, burdened with the easement, is of some determinative value to the owner, which is not ordinarily the case.'—*Clayton v. C. & D. R. Co.*, 67 Ia., 238, 25 N. W., 150.

Moreover, it should be remembered in connection with the seeming injustice of permitting the fee owner, upon abandonment by the condemnor, to take back the title to his land after having received its full value, that this so-called value is fixed, not by the owner; he is forced to accept whatever value others may place upon his land. With the condemnor the situation is quite different; if he is not satisfied with the valuation fixed by a commission or jury, he may decline to pay the damages assessed. It is no great price to pay for the right to use the imperial power of eminent domain, which requires of the condemnor that when he shall have permanently ceased to use that which he has taken for a public purpose, he shall abandon the title, as well as the physical possession, and permit both to revert to the one from whom, by the power of sovereignty alone, he was able to wrest it. It might be well also to bear in mind that when an abandonment of a right of way occurs, the condemnor ordinarily leaves a whole community in worse condition than when he found it. That is to say, after having established a railroad and encouraged investments and improvements upon the faith of its perpetuity, ordinarily he inflicts a serious injury upon the community through which the road has been operated when he completely abandons and ceases to operate the same.

In *Farmer v. Treasury Co.*, 35 Colo., 595, 83 Pac., 465, 4 L. R. A. (N. S.), 106, Mr. Justice Gabbert, speaking for the court, says:

“The authority to exercise the right of eminent domain for public use is based upon the theory that property is granted the subject upon condition that it may be retaken to serve the necessities of sovereign power;

to this end agencies created by the state, the purpose of which is to serve the public, may exercise this right."

that is to say, the sovereign may take from the subject that which the former has granted the latter, provided always, the retaking be for a public or sovereign purpose. We are not unmindful of section 14, article 2 of our constitution which, under certain circumstances, permits private property to be taken for seemingly private purposes, but in reality we believe consideration for the public welfare enters into the purposes enumerated in said section. But even if this view be not tenable, still the cases referred to in said section are *sui generis*, forming a distinct exception to the general rule, if it be granted that the purposes enumerated in said section are not *quasi*-public in their nature.

It follows from what we have already said, that the highest title which the subject can take, call it by whatever name we may, is always qualified by this higher right of the public exercised, directly or indirectly, through and by its sovereign. But when the sovereign has bestowed upon the subject the highest possible title, it is impossible for the sovereign, *in invitum*, again to repossess himself of his former absolute title. Whatever title the sovereign thereafter thus acquires is a qualified or terminable one. If the subject may not hold or retain the title to his land to the prejudice of the public weal, no more can the sovereign (or any agent exercising the power of sovereignty) retain the title taken from the subject for the public weal, after such retention permanently ceases to advance the purpose for which the land was taken. Or, otherwise stated, if the sovereign may retake only for a public purpose, he may continue to hold that which has been retaken only so long as such holding promotes the public good. Permanent abandonment of the use of the property for the public good must result in the reversion of the title. The sovereign has no inherent or

superior power merely because he is a sovereign. His power is the power to serve, not to despoil. He may take from one subject for the purpose of bestowing upon all subjects; more he cannot do. In these modern times sovereign power is not despotic power, and when the state delegates the power of eminent domain to a corporation or individual, the agent clothed with this regal prerogative must act for all. Not only in the matter of the taking must the agent of sovereignty so act, but in the matter of the retention of the thing taken as well. Such agent is not permitted, under our statutes, at least, to assume in the first act the role of a benign, constitutional sovereign, and in the last that of an unbridled autocrat. The power to take being qualified, the title taken must be likewise qualified. Nor can this fundamental principle, as we have seen, be destroyed by the mere fact that constitutions and statutes may require the condemnor to pay full value for the thing taken. Any other view would permit a railroad company, for instance, to acquire title to real estate by the power of eminent domain, and thereupon abandon its original purpose and sell its right of way so taken to private parties, without ever having put it to the use for which alone, under our statutes, title to the same could be acquired. Fortunately, the language of our act does not require a construction leading to such results.

Our conclusion is that the Denver Circle Railway Company took a terminable or qualified fee in the right of way here involved, which was liable to be defeated whenever it ceased to use the land for the purpose contemplated by our constitution and the decree rendered in its favor. And it follows, since the evidence clearly establishes absolute and permanent abandonment of this right of way by the said company, that appellee's pretended title to the land condemned by the city, and involved in this proceeding, is without foundation.

The judgment of the trial court is reversed, and the cause remanded for further proceedings in harmony with the views herein expressed.

Judgment Reversed.

KING, J., specially concurring:

I concur in the conclusion reached by the court resulting in the reversal of the judgment, but limit my concurrence in the opinion to so much thereof as is necessary to a determination of the issues in this case. With that part of the opinion which declares that under no circumstances, as the law is now written, can an absolute fee be taken from the owner *in invitum*, and vested in the petitioner by proceedings under the eminent domain statute, and with that part which holds, or from which it necessarily follows, that the general assembly has not the power to enact a law by virtue of which such an estate may be taken, I do not concur. Upon those questions, I express no opinion. Such declarations, not being necessary to a determination of this case, are mere *dicta*.

I am authorized to state that HURLBUT, J., and BELL, J., join me in limiting concurrence as herein expressed.

On Rehearing.

Counsel for appellee in his petition for rehearing makes no complaint concerning the conclusion reached by us in the original opinion handed down in this case, in so far as we determined that his client, Bear Pearson, obtained no title to the land involved by reason of the deed which he obtained from the railroad company, or its grantees. But he calls our attention to the fact that as to the thirty feet of lot 14, block 15, being the property claimed by appellant Lederer, Pearson claims title through another and second source, viz.: a quit claim deed from the alleged heirs of one A. B. McKinley, the said McKinley having purchased the property at a foreclosure sale of a trust deed given by one Jacox, long prior to the time that

the said Lederer obtained the title upon which she relied by quit claim deed from the heirs of the said Jacox. The appellants on the trial, in their briefs filed in this court, and on oral argument challenged the sufficiency of Pearson's proof of his alleged title derived from the said McKinley, and inasmuch as appellee at no time (prior to the filing of his petition for rehearing) attempted to answer the arguments or meet the authorities offered by appellants in this behalf, we assumed that he had abandoned this point, or did not desire to press it, hence we made no direct reference to it in the original opinion. Moreover, no authorities are cited by appellee in his brief on rehearing to support his contention that he properly proved his alleged title derived from the heirs of McKinley. The record discloses that on the trial appellee offered a quit claim deed dated April 28, 1910, long after the complaint in this case had been filed, which quit claim deed recites that:

"Mary W. Burns and Ellis M. Johnson, both formerly McKinley, and being the sole and only heirs of Alexander B. McKinley, deceased, in consideration of \$1.00, convey to Bear Pearson the east thirty feet of Lot 14, Block 15," etc.

To this offer the appellant, Lederer, through her counsel, then and there objected, "for the reason that there is nothing to show that these parties are the heirs of Alexander B. McKinley." This objection was well taken, and should have been sustained. Neither then nor later did Pearson attempt, on the trial below, so far as the record discloses, to make any proof whatever of the heirship of Burns and Johnson, or the death of their alleged ancestor, McKinley. An excellent discussion of this question will be found in *Dyer v. Marriott*, 89 Kans., 515, 131 Pac., 1185-8.

Abundant authorities are cited and quoted from in the *Dyer* case to support the rule that:

“When one attempts to derive title to land through the heirs of a former proprietor, the fact of heirship must be proved. This cannot be done by recitals, merely, in the deed, especially where the deed is of recent date, which, at most, amounts to a mere claim of heirship.”

It will be seen that Pearson as completely failed to prove the title which he attempted to trace from McKinley as he failed in his attempt to prove the title which he claimed from the railroad company.

• The petition for rehearing will be denied.

Decided July 14, A. D. 1913. Rehearing denied October 14, A. D. 1913.

[No. 3726.]

ROLLINS V. FEARNLEY INVESTMENT AND REAL ESTATE
COMPANY ET AL.

1. APPEALS—*Finding on Sufficient Evidence, Though Conflicting*, will not be disturbed.
2. — *Trial by the Court*. The admission of incompetent evidence held not prejudicial.
3. WATER RIGHTS—*Decree Adjusting*, specifically limiting the use of water decreed to the appellee to the irrigation of their own lands, which were accurately described, and allowing the use of the water only when necessary, providing that all waters not used by appellee shall go to appellant for the irrigation of his lands, provided he shall comply with the contract upon which his rights were based, held sufficiently definite to protect the right of the appellant.

Appeal from Arapahoe District Court. HON. CHARLES McCALL, Judge.

Mr. WILLIAM YOUNG, Mr. JAMES H. BROWN for appellant.

Mr. GEORGE F. DUNKLEE, Mr. EDWARD V. DUNKLEE, Mr. O. E. JACKSON for appellees.

CUNNINGHAM, Presiding Judge.

Appellant, Rollins, as plaintiff below, in April, 1909, filed his complaint to quiet title to a certain ditch and to

a water right incident thereto, averring complete ownership and absolute title of both to be in himself. In 1903, Rollins instituted an injunction proceeding against the appellee Investment Company *et al.*, in which the same question, viz.: the title to the ditch and water here involved, was litigated. In the first action Rollins obtained, *ex parte*, a preliminary injunction restraining the investment company and its tenants from diverting and using water from the ditch. On final hearing the trial court dissolved this injunction and found that the equities of the case, instead of being with plaintiff, were with defendant, the investment company, defendant below and appellee here. The injunction case, which was appealed, was affirmed—see *Rollins v. Fearnley*, 45 Colo., 319, 101 Pac., 345, where the facts are more fully stated.

On appeal in the former case the supreme court not only found that there was ample evidence introduced on the former trial to support the findings of the lower court that the equities were with the investment company, but expressed the belief that said findings were undoubtedly correct and added that they were unqualifiedly approved by it.

The sole question in both cases brought by appellant turned upon the title to the ditch, and the water right incident thereto. The testimony in both cases was similar. On the first trial, after finding the equities against Rollins and for the investment company, the trial court dissolved the preliminary injunction theretofore granted by it, and dismissed the case, assigning as its reason for such action the absence of proper and necessary parties to a complete determination of the controversy. The supreme court, in its opinion already cited, expressly ruled that, “all matters affecting appellant Rollins’ rights, as alleged and set forth in his complaint, were correctly determined by the trial court.” Among the matters set forth in Rollins’ original complaint, indeed the principal

matter, was his claim of title to the ditch and water right which in this action he seeks to have quieted in himself.

The evidence in this case (as we read the records in both cases) preponderates in appellee's favor quite as clearly as in the former case.

It is urged in behalf of appellant in his brief in the instant case that the trial court committed error in decreeing to appellees a greater amount of water than is reasonably required to properly irrigate their land. It would perhaps be sufficient on this point to say that we find no error assigned which requires us to consider this question; but, inasmuch as the evidence introduced on this point was sharply conflicting, we are unable to say that the finding and decree of the trial court in this behalf were wrong. Moreover, the judgment specifically limits the use of the water decreed to appellees to their lands, which are accurately described in the decree, and allows the appellees to use the same only whenever it is necessary, and provides: "That all surplus water over and above the amount of water used by defendant and the intervenor (appellees) for the purpose of irrigating their said lands, shall go to the plaintiff, his heirs, executors, administrators and assigns, for the purpose of irrigating his said lands," providing the appellant shall carry out the terms of the contract on which his rights are based, which contract it is not necessary for us to set forth. These provisions of the decree clearly limit the rights of the appellees to the use of the water on the lands now owned by them, and sufficiently guard the rights of appellant against a prodigal use of the water by appellees.

Serious complaint is made by appellant to the rulings of the trial court on the introduction of testimony, and we think that the record discloses that both parties were permitted, over objection, to introduce much incom-

petent evidence, but, as the trial was to the court without a jury, we cannot say that prejudicial error resulted therefrom.

Judgment Affirmed.

Decided September 15, A. D. 1913. Rehearing denied November 10, A. D. 1913.

[No. 3748.]

HOLMES V. SMITH.

PRACTICE—*Findings of Fact Construed.* Action for money lent, the advance being made by the check of plaintiff payable to defendant. On appeal, defendant contended that the court below based its finding entirely upon the check. But the findings expressly stated that "the check corroborates the plaintiff's testimony." This was held to overthrow the appellant's contention.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. JOSEPH S. JAFFA for appellant.

Mr. G. Q. RICHMOND for appellee.

Per Curiam.

Action by the plaintiff, Smith (appellee here), for money loaned. Holmes, appellant, contends that the money was borrowed by him of plaintiff for a corporation of which he, Holmes, was the treasurer. No other defense was made. Trial was to the court without a jury. Judgment for plaintiff.

The principal contention made on this appeal is that the evidence is not sufficient to support the findings of the trial court that the money was loaned by appellee to appellant personally. The money was paid by appellee's personal check, made payable to the order of appellant. There is no testimony whatever that appellant stated to appellee at the time he borrowed the money that he desired to borrow the same for the corporation, or that he

had authority to thus obligate the corporation. Neither does it appear that appellee, at the time the loan was made, knew that appellant was an officer of the corporation. Counsel for appellant insists that the trial court based its findings entirely upon the fact that the check was made payable to appellant. This contention is quite contrary to the plain language of the court in its findings, for therein it is said: "The check itself *corroborates* the plaintiff's testimony."

The findings and judgment of the trial court are abundantly supported by the evidence, and the judgment must be affirmed.

Judgment Affirmed.

Decided September 15, A. D. 1913. Rehearing denied October 14, A. D. 1913.

[No. 3469.]

COCKBURN ET AL. V. KINSLEY.

1. **PLEADINGS**—*Allegations on Information and Belief.* The complaint alleged, as to material facts, that plaintiff "is informed and verily believes," without the additional allegation "and on information and belief avers." Held the omission did not impair the sufficiency of the complaint, and the cause having been tried without regard to it, it was disregarded on appeal.

2. — *Amendment.* Action against the officers of a foreign corporation, upon a promissory note of the corporation, which, it was alleged, though doing business in Colorado had failed to file with the secretary of state any copy of its charter as required by statute (Rev. Stat., sec. 916). An amendment of the complaint to the effect that such corporation had been carrying on business in Colorado for about one year prior to the execution of the note, *held* properly allowed.

3. **CONTRACTS**—*Law of Place.* The law of the place where the contract is made controls as to its validity and the capacity of parties; the law of the place of performance, with reference to all questions concerning performance, whether the action is brought at the place of performance

or elsewhere; and the law of the forum as to all questions concerning the remedy.

The capacity of a corporation is determined by the law of its creation, but may be restricted or encumbered with conditions by the statute of another state where it attempts to contract.

When the capacity or authority of an agent, executor, or administrator is in question, the law of the state or country where the relation was created necessarily enters as a factor.

But even though the party making the contract was capable thereto, it may still be unenforcible, because it calls for the performance of acts, to which, according to the law of the place of performance, such person is incompetent.

A foreign corporation doing business in Colorado fails to file with the secretary of state a copy of its charter as required by statute. A promissory note executed by such corporation in Colorado, but payable in another state, charges the officers of the corporation, under Rev. Stat., sec. 919.

4. CORPORATIONS—*Foreign—Liability of Officers and Members.* The statute requiring every foreign corporation doing business in Colorado to file with the secretary of state a copy of its charter, and imposing upon the officials and members of such corporation personal liability upon all contracts of the corporation made within this state (Rev. Stat., secs. 916, 919), was intended primarily for the protection of our own citizens, and applies only to such foreign corporations as engage in the general prosecution here of the business for which they were incorporated.

A single transaction is not "doing business," and the phrase does not include the mere sale of shares, measures taken for promoting the affairs of the corporation, or meetings of the directors for such purposes only.

A corporation organized under the laws of Arizona was operating a mine located in the republic of Mexico. The directors of the corporation resided in Colorado Springs, and the superintendent of the mine corresponded with them in reference to his operations. Certain shares of stock had been sold at Colorado Springs by correspondence with a party in Chicago. The treasurer, of his own motion, had caused letter-heads to be printed, designating a certain office in Colorado Springs as the main office of the company. The corporation owned no property in Colorado, and, save to execute one promissory note evidencing the loan of money, had never done any business within the limits of Colorado. In an action upon this note against the officers of the corporation, under Rev. Stat., secs. 916, 919, *held* that the corporation had not "been doing business" within the meaning of the statute.

5. STATUTES—*Construed.* The act of 1901 (Laws 1901, c. 52, Rev. Stat., secs. 901-912) has not the effect to repeal Rev. Stat., secs. 916, 919.

Appeal from El Paso District Court. HON. JOHN W.
SHEAFOR, Judge.

Messrs. JOS. P. TRICKETT, W. M. SWIFT, GEORGE H. THORNE and LAWRENCE T. GRAY, *pro se*, for appellants.

Messrs. H. K. WING and J. A. CARRUTHERS for ap-
pellee.

MORGAN, J.

Plaintiff had judgment in the El Paso district court in January, 1909, on his complaint filed in April, 1908, on a promissory note. Defendants appealed. The complaint set forth a copy of the note as follows:

"\$1500.00 Colorado Springs, Colo.,
"Sept. 28, 1907.

“Thirty days after date, we promise to pay to the order of M. F. Schutt Fifteen Hundred Dollars, at 216 Security Bank Building, Minneapolis, Minn., with interest at 8 per cent per annum from Sept. 28 until paid.

“Value received.

“THE BAVICANORA MINES COMPANY,

“By Geo. A. Cockburn, Secy.

“By Geo. E. Maxwell, Prest.”

The action is against Cockburn and Gray, two of the board of directors of the company that made the note. The complaint states that the company was incorporated and existing under and by virtue of the laws of Arizona Territory; that it had been doing business within this state for about one year prior to the date of the note; that it had not on that date or prior thereto, or at all, filed with the secretary of state a copy of its charter of incorporation, or a certificate, and that the payee had assigned the note to the plaintiff before the commencement of the action.

A general demurrer for insufficiency and for defect of parties was overruled.

The answer denies that the company was "doing business" in Colorado and denies that the note was made and delivered therein.

It may be seen from these pleadings that the plaintiff's right to recover against the defendants, personally, depends upon the effect of a failure on the part of the company to comply with the statutes that require the filing by foreign corporations of their articles of incorporation with the secretary of state.

The appellants contend that the general demurrer should have been sustained because the complaint, on alleging certain facts on information and belief, states, "that the plaintiff is informed and verily believes," but fails to follow up such statement with the words, "and upon such information and belief alleges." Our code provides how such allegations should be made and the plaintiff failed to comply with it, but this case should not be reversed for this reason alone, as the technical defect did not destroy the general sufficiency of the complaint and the defendant thereafter answered and the case was tried regardless of this defect.

The appellant also contends that the court erred in permitting the plaintiff to amend his complaint by inserting the words, "and for about one year prior thereto," immediately preceding the words, "doing business within the State of Colorado." It was proper to allow this amendment and it did not prejudice the rights of the defendants to such an extent that the case should be reversed on account thereof as the defendants answered and proceeded to trial on the issues.

The appellant discusses the other assignments of error under three propositions, which will be disposed of in the following order:

1. That the action on the note with reference to the

defendants' personal liability, or otherwise, is governed by the laws of Minnesota, where the note was made payable.

2. The statute of 1877, by virtue of which the plaintiff seeks to hold the defendants liable, personally, was repealed by implication by the general corporation law of 1901.

3. That the company was not "doing business" in this state within the meaning of the statute.

As to the first proposition, it is concluded that the law of this state is applicable and governs the liability of these defendants, personally, under the statute involved, if the company "was doing business" in this state within the meaning of the statute.

Certain facts should be kept in mind; the note was specifically made payable in Minnesota; it was made and dated in Colorado; suit was brought in Colorado against two directors living in Colorado. During the consideration of this point we shall concede that the company was "doing business" in Colorado and had failed to file its articles of incorporation as required by statute. (The facts, that the company is an Arizona company, that the mines are located in Mexico, and that the directors held meetings in Colorado Springs, are only necessary in the consideration of the third proposition.)

The law is quite plain that where the contract is made in one state and performance is to be in another, the law of the place of performance governs with reference to all questions concerning the performance, whether the suit be brought in that place or not—sec. 398, Wharton on Conflict of Laws—and that the law of the place where the suit is brought governs in all questions concerning the remedy—*Id.*, sec. 427k, 428a—and that the law of the place where the contract is made governs all questions concerning the validity of the note and the capacity of the makers thereof.—*Id.*, sec. 427k *et seq.*;

Wolf v. Burke, 18 Colo., 264-8, 32 Pac., 427, 19 L. R. A., 792.

Wharton on Conflict of Laws, sec. 393, says:

“Hence it is that when we come to determine the seat of an obligation, from which seat its legal relations are inferred, we find ourselves in a labyrinth of speculations, from which we can only emerge by following the landmarks of arbitrary, juridical rules. It follows, from the nature of the case, that these rules, applied as they are by so many courts, in so many distinct legal atmospheres, to so many varying states of fact, and without any imperative principle to appeal to, should often conflict.”

In sec. 401, he says:

“A contract, so far as concerns its formal making, is to be determined by the place where it is solemnized, unless the *lex situs* of property disposed of otherwise required; so far as concerns its interpretation, by the law of the place where its terms are settled, unless the parties had the usages of another place in view; so far as concerns the remedy, by the law of the place of the suit; and so far as concerns its performance, by the law of the place of performance.

“The rule, it is true, is sometimes differently expressed. Thus, in the Supreme Court of the United States, in 1875, it was said, in *Scudder v. Union Nat. Bank*, 91 U. S., 406, 23 Law Ed., 245, by Mr. Justice Hunt, that: ‘Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought.’ To this statement, however, it may be objected that in cases where the place of making the contract conflicts with the law of

the place of performance, the validity of the contract, so far as concerns its performance, depends upon the law, not of the former but of the latter place. It has hence been frequently held that a contract illegal by the law of the place of performance is illegal everywhere. On the other hand, an action may be maintained on a debt good where it is payable, though invalid by the local laws of the place where the contract is made. But the conflict of opinion in this respect is rather nominal than real." See also sec. 402.

In sec. 427h, he says:

"The capacity of the parties to contract is one of those matters that relates to the preliminary question, whether, in a legal sense, any contract has been brought into existence; and its governing law should be determined by a fixed rule not dependent upon the intention of the parties. * * *

When the party whose capacity is in question is an artificial person, like a corporation, its capacity is necessarily determined, or at least limited, by the law of its creation, though its capacity may be still further restricted, or at least encumbered with conditions, by a statute of another state or country in which it attempts to contract. So, when the question relates to the capacity or authority to contract, of a person who acts in a representative capacity, as an agent, or executor or administrator, the law of the state or country in which such relation was created necessarily enters as a factor. This is a mere result of the principle stated, *ante*, sec. 427f, that any matter relating to the preliminary question whether a contract has been made, is governed by the law of its *situs*, whether that *situs* be at the place where the contract is attempted to be made or elsewhere. * * *

As between the law of the place where the contract is made and that of the place where it is performable, the weight of authority favors the former. In other

words, this matter comes within the first rule of the *Scudder* case, which, for this purpose, may be treated as an absolute rule, not dependent upon the intentions of the parties.

A distinction is to be observed, however, between the capacity of a party to make a contract, and his or her capacity to do the act essential to its performance. It seems clear that, while the former question is governed by the law of the place where the contract is made, the latter ought to be governed by the law of the place of performance. So that, even assuming that a party was capable of making a contract by the law of the place where it was made, it may still be invalid and unenforceable because it calls for the performance of acts which, according to the law of the place of performance, he or she is not competent to do. It will be observed, however, that this is upon the assumption that the law of the place of performance renders one incapable of doing the acts essential to the performance of the contract, and not merely that it would render him incapable to make the contract in the first instance. In a note to this section is found: "In *Campbell v. Crampton*, 18 Blatchf., 150, 2 Fed., 417, the court, after a full discussion of the subject, laid down the general principle that the capacity of a party to make a personal contract is to be determined by the law of the place where the contract is made, notwithstanding that it is performable elsewhere."

See also, sections 427r and 427s.

In sec. 439a, he says, quoting from the case of *Howenstein v. Barnes*, 5 Dillon, 432:

"Any interpretation or construction applicable or incidental to the performance should be governed by the law of the place of performance, and such matters of construction or interpretation as go to the execution and validity of the contract are determined by the laws of the place where the contract was made."

In 9 Current Law, 596, it is stated that, "All matters bearing upon the execution, interpretation, and validity of a contract, and measure of damages for breach thereof, are determined by the law of the place where the contract is made." And in the notes the following: "When a contract is made in one state to be performed in another, the *lex loci contractus* controls as to the nature, validity, obligation, construction, and interpretation of the contract.—*Missouri Life Ins. Co. v. Lovelace* (Ga. Ap.), 58 S. E., 93. Parties are presumed to contract with reference to the place of the contract, and if it is valid there it is valid everywhere.—*Id.* Validity of contract made by resident of New Jersey in Pennsylvania, as affected by statute of frauds, governed by law of Pennsylvania.—*Calloway v. Pretty* (Pa.), 67 A., 418."

In a Tennessee case a promissory note was made by a married woman in that state and made payable in Ohio, but on a suit on the note in Tennessee, she pleaded the law of coverture of that state, and defeated the action.—*First Nat. Bank of Geneva v. Shaw*, 109 Tenn., 237, 70 S. W., 807, 59 L. R. A., 498, 97 Am. St., 840.

The converse of this rule is not so plain; where a note is made in a state where a married woman would be liable on her individual obligations and payable in another state where she would not, and suit brought in the state where the note was made; *quaere*, could she, the maker, defeat the right to recover in the state where the note is made?

It is not believed she could, for, when she made the note, it was, then and there, impressed with the law of the state where made, and such law would certainly be enforced against her there. And, it would seem to follow that, in the present case, the law of this state making the defendants personally liable would be impressed upon the note involved herein, and would be enforced against them here.

The controlling proposition is whether the liability of the defendants in the present case comes either within matters bearing upon the *execution, interpretation, and validity* of the contract, including the capacity of the parties, or, within the law governing the *remedy* thereupon. It appears to come within both of these factors; and, if the note was made in violation of the statute, it became subject to the effect of such statute imposed upon the directors or stockholders of the company that made it. In other words, such making of the note affected it as if each director's name was signed on the note at the time it was made; therefore, the judgment of the lower court is right upon this point. See also *Cook v. Merritt*, 15 Colo., 212, 25 Pac., 176; *Jones v. The Aspen Hdw. Co.*, 21 Colo., 263, 40 Pac., 457, 29 L. R. A., 143, 52 Am. St., 220.

It seems also that the law of this state would govern, because applicable to the remedy, although the law as to the *right*, and the law as to the *remedy* must not be confused.

Pomeroy, in sec. 2 of his Remedies and Remedial Rights, defines *remedy* as the "final means by which to maintain and defend primary rights and enforce primary duties." Plaintiff's primary right in this case is to have the note paid, but whether his remedy is governed entirely by the laws of Minnesota where the note is made payable, or by the laws of Colorado where the note was made, and where the suit was brought, is a difficult question. It will be observed in this instance that the *lex loci contractus* and the *lex fori* unite, but the *lex loci solutionis* is in Minnesota, because the note is made payable there. The law of Minnesota would govern on all questions as to the *mode* of payment, *days of grace*, *protest on non-payment*, the *kind of money* in which payment is made, and, possibly, the *negotiability* of the note; but as to the *validity*, including the capacity of the parties, and the

primary right of the plaintiff to enforce payment against these defendants because of any law of Colorado that entered into the making and final validity of the contract, it would be governed by the law of the place where the note was made and by the law of the place where suit was brought; and the plaintiff's remedy would include his right to rely, in stating his cause of action, upon the law of Colorado making the defendants liable individually. The plaintiff's remedy depends upon his primary right, and the delict or wrong of the defendants, and either may arise out of the contract as to the defendants' duty, or the invasion of the plaintiff's right in the making of the contract, or in the failure to perform it.

Under the Tennessee case the defendants could plead any law of the *forum* that would exempt them from liability, and the converse ought to be true that they cannot resist the effect of a law of the *forum* that makes them liable.

The *second* proposition is merely introductory to the third, and is wholly untenable on the part of appellant, as the law of 1901, by which it is claimed the law of 1877 was, by implication, repealed, provides *additional* requirements of foreign corporations and neither expressly nor by implication repeals the former law.

The *third* proposition involves a determination of what is meant under the statute by the term "doing business." I have reached the conclusion that the acts and things done and the business transacted by the company in this case do not come within the meaning of the words "doing business," as such words are used in the statute relied upon.

The record discloses that the Bavicanora Mines Company held directors' meetings in Colorado Springs and at one of these meetings borrowed \$1,500.00 from the plaintiff's assignor and used the money to pay the vice-president of Mexico upon the lease of the company's

mines in that country, the money being sent to Mexico for that purpose on the day the note was executed, and the money received. Some stock in the company was sold and issued at Colorado Springs by correspondence with a man in Chicago. It also appears that the treasurer, on his own responsibility, had some letterheads printed designating a certain office in Colorado Springs as the main office of the company. It appears from the evidence that this was all the business that was transacted in Colorado Springs, and that the company transacted all of the business in reference to operating its mine in Mexico, where the mine is situated. This mine was run by a superintendent in Mexico who corresponded with the directors in Colorado Springs in reference thereto. The company owned no property in Colorado.

The authorities seem to agree that the purpose of a statute such as ours requiring foreign corporations to file a certificate or charter is to protect creditors or other obligees of such corporation, with reference, I should say, to the citizens of the state enacting the statute. The authorities agree also that a single act or business transaction is not "doing business" within the meaning of the statute, and that "doing any business" means business involving transactions concerning the actual purposes for which the corporation was organized, and does not include transactions between corporators and stockholders themselves, involving transactions concerning promotion, transfers of stock and meetings of the board of directors for such purposes only. Whether the execution of the note and the borrowing of money, as in this instance, is "doing business" within the meaning of the statute can be determined only by an examination of similar cases involving a similar transaction.

It is contended by the appellee that, as the constitution uses the expression "doing any business," and the statute uses the same expression in sec. 917, that a single

act of business would control the effect of the statute. However, secs. 920 and 921 of the same act use the words "doing business." The first interpretation of the constitutional provision and said statute was by our supreme court in the case of *Utley v. The Clark-Gardner L. M. Co.*, 4 Colo., 369, wherein the court construes the terms used to mean "engaging in or carrying on business," and said: "The prohibition extends to doing business before compliance with the terms of the statute. We do not think this is an abridgment of the right of a foreign corporation to sue. It extends only to the exercise of the powers by which it may be said to ordinarily transact or carry on its business. To what *extent* the exercise of these powers is affected we do not decide."

In the case of *Cooper Manuf. Co. v. Ferguson et al.*, 113 U. S., 727, 28 L. Ed., 1139, 5 S. C. Rep., 739, construing the same provisions, the court said:

"Reasonably construed, the constitution and statute of Colorado forbid, not the doing of a single act of business by a foreign corporation without the filing of the certificate and the appointment of an agent as required by the statute. * * * To require such a certificate as a prerequisite to the doing of a single act of business when there was no purpose to do any other business in the state, would be unreasonable and incongruous."

Thompson, in his work on corporations, announces the same construction in sec. 6670, as follows:

"This is seen from the fact that the particular transactions are frequently described as 'independent,' 'isolated,' 'incidental' and 'casual,' not of a character to indicate a purpose to engage in business within the state. And, to constitute doing business within the meaning of such statutes, there must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created. And a distinction is to be drawn between the purposes of a corporation and its powers.

The term 'business' used in such statutes means an established business, either in connection with or apart from some business that had its domicile in another state. 'Doing business' within the meaning of such a statute is the maintaining an office and having capital invested and carrying on a regular business; that is, maintaining an office and having a capital invested and carrying on a regular business in the state."

In 10 Cyc., 1270, the same view is expressed, as follows:

"These prohibitions are leveled against the act of foreign corporations entering the domestic state by their agents, and engaging in the general prosecution of their ordinary business therein, and they do not apply therefore to acts not constituting any part of their ordinary business."

The author cites the following cases which have been examined: *Ware v. Hamilton Brown Shoe Co.*, 92 Ala., 145, 9 So., 136; *Colorado Iron Works v. Sierra Grande Mine Co.*, 15 Colo., 499, 25 Pac., 325, 22 Am. St. Rep., 433; *Mandel v. Swan Land etc. Co.*, 154 Ill., 177, 40 N. E., 462, 45 Am. St. Rep., 124, 27 L. R. A., 313; *John Deere Plow Co. v. Wyland*, 69 Kan., 255, 76 Pac., 863, 2 Ann. Cas., 304; *Hogan v. St. Louis*, 176 Mo., 149, 75 S. W., 604; *People v. Wemple*, 131 N. Y., 64, 29 N. E., 1002, 27 Am. St. Rep., 542; *Galena Min. Co. v. Frazier*, 20 Pa. Sup. Ct., 394; *Cooper Manuf. Co. v. Ferguson*, *supra*.

The testimony was undisputed that the president of the company in the present case brought with him to Colorado Springs from Minnesota a certified check of his son-in-law, the payee of the note, and turned it over to the treasurer of the company at Colorado Springs at the time the note was made. He indorsed the note and asked the defendants to do so at the same time, but they refused. Such business was in the nature of a transaction peculiar to the corporate powers of the company relating

to its internal concerns, disconnected and distinguished from the purposes of the statute involved, and not connected with anyone that the statute was enacted to protect, and when we apply the terms "carrying on business" and "engaging in business" to this particular instance, or to any of the business such company did at Colorado Springs, we find such business foreign to such terms. Of course, it was doing business, but not in the sense intended by the statute, that is, it was not "engaging in business" nor "carrying on business" in this state under the statute.—*Caesar v. Capell* (U. S.), 83 Fed., 403, 422.

In 10 Cyc., 1267-8, the author says:

"A definition, in an act relating to the service of process, of what shall be considered as doing business within the state by a foreign corporation, will not control as to what is doing business within the state under a statute forbidding foreign corporations to do business within the state until they shall have filed their charters in every county where they intend to do business, under a statutory penalty."

From this, and the authorities upon which it is based, it clearly appears that cases involving motions to quash the service upon a foreign corporation are not controlling in cases such as the present one. It must be true, however, that decisions in cases involving the question of service wherein it is held that the foreign corporation is *not* "doing business" within the meaning of a statute permitting service in the prohibiting state are quite controlling in cases such as the present one because an inconsiderable transaction of business ought to be sufficient in the former instance that would not be at all sufficient in the latter.

In the case of *Stegall v. Pigm. & Chem. Co.*, 150 Mo. Ap., 251, 290, 130 S. W., 144, involving a motion to quash the service under a statute permitting service in Missouri

on a foreign corporation, the court overruled the motion and held that the foreign corporation was "doing business" in the state to an extent sufficient to justify service upon it in a suit brought by one of its clerks who kept its books in St. Louis, Mo. This is one of the strongest cases cited by the appellee to support his contention, but as it is based upon a statute concerning service, it would not control the rule in the present case. Furthermore, the court found in that case that the company, although incorporated in Arizona and operated in Illinois, yet, it held its meetings and made its contract with the plaintiff in Missouri, and that the work done by the plaintiff was done in Missouri. The plaintiff was a resident of that state, the company kept its bank account there, made its contracts and paid out its moneys there, and it was there that the "brain work" was done necessary to conduct its business. These facts would be sufficient upon which to hold that the company was "doing business" in Missouri to such an extent that the suit in question could be sustained by the service upon the president of the company in St. Louis, although this is not conclusive nor does it directly indicate that the same court would have held on the same facts that such acts and transactions would not be sufficient to hold the directors personally responsible in a case such as the present one.

In the case of *U. S. Rubber Co. v. Butler Bros. Shoe Co.*, 132 Fed., 398, relied upon by appellee, it is held that a foreign corporation, not having complied with the 1901 act, and having "set up business in Colorado with a factor in charge and carried on business quite extensively," could not sue upon contracts for the sale of goods in Colorado "manufactured by it in another state and consigned to respondent from time to time," because such corporation was "doing business" in this state within the meaning of the statute. No such business was done in the present case.

The John Deere Plow Co. case, *supra*, relied upon by appellee, is quite similar in many respects to the *Rubber Company* case and is not in point for the same reason; but, even in that case, the Kansas court clearly distinguished the facts involved from those present here. The court, in that case, said, in 69 Kan., 259, 76 Pac., 864, 2 Ann. Cas., 364:

“Although the record in each case discloses but one transaction of the corporation, that transaction was not merely incidental or casual; it was a part of the very business for the performance of which the corporation existed; it did distinctly indicate a purpose on the part of the corporation to engage in business within the state, and to make Kansas a part of its field of operation, where a substantial part of its ordinary traffic was to be carried on. Therefore, although a single act, it constituted a doing of business in the state within the meaning of the statute, while several acts of a different nature might not have had that effect.”

The same distinguishing feature exists in the case of *Farrior v. New England Mtge. & Sec. Co.*, 88 Ala., 275, 7 So., 200, another case relied upon by appellee. Although in that case the court said that “doing any business” is more comprehensive than “carrying on business” generally, and took issue with the construction given the Colorado statute in the case of *Cooper Min. etc. Co. v. Ferguson*, *supra*, yet, as the latter case is a direct construction of our statute, it must control.

The case of *The People v. The Horn Silver Min. Co.*, 105 N. Y., 76, 11 N. E., 155, a case relied upon by both appellant and appellee, involved the taxation of the company's property. The company claimed the benefit of an exemption in favor of manufacturing companies. The court held it was not a manufacturing company in New York, although it might be in Utah where its plant was located. The company claimed also that it was not “do-

ing business'' in New York, as the statute provided. In holding the company liable for taxation, the court said:

''The business did not consist of occasional transactions, but an office was kept there, and the business continually transacted there during the whole year. We cannot construe the words 'doing business in this state' to mean the whole business of the corporation within this state; and, while we are not prepared to hold that an occasional business transaction, that keeping an office where meetings of the directors are held, transfer books kept, dividends declared and paid, and other business merely incidental to the regular business of the corporation is done, would bring a corporation within this act; yet when, as in this case, all these things are done, and in addition thereto a substantial part of the regular business of the corporation is carried on here, then we are unable to say that the corporation is not brought within the act as one 'doing business in this state.' There is no injustice in subjecting to taxation such a corporation enjoying the benefits of our great mart, the advantages of our social order and the protection of our laws.''

In the case of *Penn. Collieries Co. v. McKeever*, 183 N. Y., 98, 103, 75 N. E., 935, 2 L. R. A. (N. S.), 127, the court, construing a statute requiring foreign corporations ''doing business'' in the state to procure a certificate to transact business, the court said:

''The rule was early declared that, unless interdicted by the state, a foreign corporation could perform within its boundaries single corporate acts, or conduct its corporate business, when not prohibited by our laws, or when not violative of public policy (*Bard v. Poole*, 12 N. Y., 495; *Hollis v. Drew Theological Seminary*, 95 *ib.*, 166), and the enactment of the present General Corporation Law was intended to regulate its existence here, if proposing to do business, by the imposition of reasonable conditions. But no such narrow policy was intended to

be declared by the statute as the prohibition of all corporate transactions by foreign corporations, irrespective of their nature, or of the condition under which they occurred; nor does the language indicate it. To bring into operation the statutory provision, the facts should show more than a solitary, if not accidental, transaction, as was the one before us. They should establish that the corporation was conducting a continuous business. To be 'doing business in this state' implies corporate continuity of conduct in that respect; such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances, which attest the corporate intent to avail itself of the privilege to carry on a business."

In the case of *Bradbury v. Waukegan & Wash. Min. Co.*, 113 Ill. App., 600, 607, in reference to what constitutes "doing business," the court said:

"Opening an office in Waukegan, and placing a safe and some office furniture therein for the convenience and use of the secretary and treasurer, where he issued certificates of stock, kept the books, and the holdings of directors' meetings there, together with the other acts charged to have been done in Lake county, bear no resemblance to the powers and objects of this corporation, as set forth in the articles of incorporation. There is no pretense that the company owned any mining properties in this state, or that it was doing a mining or smelting business here. All of its mining properties were in the state of Washington, and not in Illinois."

In the case of *The Union Trust Co. v. Sickles*, 125 (N. Y.) Ap. Div. Rep. Sup. Ct., 105, 109, 109 N. Y. Sup., 262, 264, the court, construing the words "doing business" used in a statute, said:

"The only business which the complaint shows it had done anywhere or at any time was the making of the col-

lateral trust mortgage to the Security Trust Company of Rochester to secure the total issue of \$25,000,000 bonds, the making of this underwriting agreement, constituting the manager, as its agent, to sell \$2,500,000 of these bonds, others of which had apparently already been disposed of, the procuring by the agent of defendant's signature to this underwriting agreement, the receipt of moneys from the defendant on his contract, delivery to him of the bonds he thus paid for, and the assignment of the underwriting contract to plaintiff to secure the payment of a note given the latter for a loan of \$43,000. All of these facts relate only to and are a part of an apparently legitimate effort on the part of the telephone company to dispose of its bonds; that is, in other words, to borrow money. What the expression 'doing business,' or to 'do business,' within this state, as used in the statute, really means has received judicial attention in many cases; but, except in the present case, it does not seem to have been yet held that a foreign corporation was doing business in this state, within the meaning of the statute, when it had done no business therein beyond presenting for sale and selling to individual purchasers, or floating on the market, either its stock or bonds.—*Payson v. Withers*, 19 Fed. Cas., 29, 30. The plain reading of the statute shows that it was intended to prevent a foreign corporation from doing in this state the business for the doing of which it was organized, until it had procured the required certificate, and that it does not contemplate a prohibition, either of the sale of its stock, or borrowing money on its obligations. It obviously relates only to the regular and customary business operations of the corporation."

See also *In re Ala. & C. R. Co.*, 1 Fed. Cases, page 271.

The conclusion is that our constitutional and statutory provisions, construed under the criterion and in the light of the foregoing authorities, do not include within

their purview such transactions as the evidence discloses in this case. The policy and purpose of these provisions are to require foreign corporations, upon entering the state and engaging in the general prosecution and operation of the ordinary business which they were incorporated to carry on, to file their articles of incorporation or other authority under which they are authorized to act as a corporate body, and to designate state agents and a principal place of business, in order that the state authorities may supervise and control their transactions, in common, as far as may be, with its domestic companies, and to the end that the citizens of this state may be advised and protected in their transactions with them to such an extent as these statutory requirements may afford.—*Caesar v. Capell, supra*; 3 Words and Phrases, 2155 *et seq.*; *Penn. Collieries Co. v. McKeevor, supra*.

It is determined, therefore, that the Bavicanora Mines Company was not “doing business” or “doing any business” in this state within the meaning of the constitutional and statutory provisions aforesaid, of such a nature, or to such an extent, that it was required to comply with such provisions, and that the defendants are not liable, therefore, on the note sued upon.

Reversed with directions to dismiss the suit.

[No. 3721.]

WILSON ET AL. v. AGNEW.

1. LANDLORD AND TENANT—*Tenant's Surrender—Effect*. Tenant's surrender of leased premises, accepted by the landlord, extinguishes the relation of landlord and tenant, and discharges the tenant from all liability for rents subsequently accruing. Where there is no express agreement of the parties, the question whether a surrender has been effected depends on their intentions.

2. — *Rights of Landlord*. The landlord, on the tenant's abandonment of the premises or violation of the terms of the lease, is not re-

quired to re-let for the protection of the tenant. He may suffer the premises to remain vacant and recover the rent for the residue of the term.

But he may, at his election, enter and determine the lease, and at the same time recover the balance of rentals then due. He is not entitled to demand rents subsequently accruing.

3. — *Rights of Tenant—Security for Rent.* Where the tenant makes a deposit to secure his performance of the covenants of the lease and is dispossessed during the term for a default in the payment of rent, the deposit is not forfeited. The tenant recovers the balance, after deducting the damages suffered by the landlord by reason of the tenant's defaults, prior to dispossession.

4. — *Manner of Tenant's Dispossession Is Immaterial.* The result is the same whether the landlord accepts the tenant's voluntary surrender, or expels him.

5. *CONTRACTS—Penalty or Liquidated Damages.* Appellee's assignor rented premises of the defendant for a term of years. The lessee gave a bond of \$3,000.00, with surety, to guarantee performance of the lease. Five thousand dollars, evidenced by a promissory note secured by a deed of trust, was deposited with the lessor, to be considered as a loan for the period of the lease, but provision was made that if the lease should be forfeited the note and deed of trust should be canceled. At the end of six months the assignee abandoned the premises and the landlord entered, taking entire control. *Held*, following *Carson v. Arventes*, 27 Colo., 81, it was not necessary to determine whether the deposit made by the lessee constituted liquidated damages or a penalty.

6. *EVIDENCE—Parol Not Admissible.* Parol evidence is not admissible to enlarge the liability of the lessee for damages not mentioned in the lease.

Appeal from Denver District Court. HON. GEORGE W. ALLEN, Judge.

Mr. MEL EMERSON PETERS, Mr. HALSTED L. RITTER, Mr. HAMLET J. BARRY and Mr. JOHN T. BARNETT for appellants.

Mr. E. I. THAYER for appellee.

MORGAN, J.

Defendants appeal from a judgment against them in an action begun March 23, 1910; by the plaintiff, Agnew,

assignee of the Psychic Science Company, a corporation that leased from the defendant, Wilson, a certain piece of real property in Denver, Colorado, for a period of ten years. The suit was brought by the assignee of the lease to recover the amount of a deposit of five thousand dollars and to cancel a bond for three thousand dollars made by the lessee to the lessor.

The entire transaction was reduced to writing, and consisted of a lease for ten years, Wilson, lessor, and the Psychic Science Company, lessee; a bond for \$3,000 given to the lessor by the lessee as principal and the Empire State Surety Company as surety, to guarantee the keeping of the obligations in the lease; a written agreement was also entered into between the lessor and lessee whereby \$5,000 was turned over to the lessor, to be considered, so long as the lessee kept the obligations of the lease, as a loan for ten years at six per cent, evidenced by a note and deed of trust on the leased property, but with the further provision that if the lessee should fail to keep the obligations of the lease, or any of them, or forfeit the lease, then the said note and deed of trust to be canceled and released; a written option was also given by the lessor to the lessee to purchase the property within one year.

The Rome Realty & Investment Company and F. L. Peters were made defendants because the property was conveyed to the investment company by Wilson after the lease, and prior to the suit, and Peters was the agent of the defendant, Wilson. The Empire State Surety Company was made a defendant because the plaintiff had conveyed to it certain property to indemnify it against loss on account of its suretyship on the bond, and the complaint prayed for a reconveyance of this property to her.

The complaint demands that Wilson pay the \$5,000 left with him as a deposit, and that the \$3,000 bond given to him be canceled. The defense is that the \$5,000 deposit

and the \$3,000 bond were made and agreed upon between the lessor and the lessee as liquidated damages, and that the defendant is entitled to retain the \$5,000, and entitled to the \$3,000 guaranteed by the bond, because the lessee forfeited the lease. The defendants filed a cross-complaint, demanding the \$3,000 due upon the bond, and the Empire State Surety Company filed its answer, denying liability.

The lower court gave the plaintiff judgment for the \$5,000, except the balance of the rent owing on the last month that the lessee occupied the building; ordered the cancellation of the bond for \$3,000, released the surety thereupon, and ordered the surety to reconvey to the plaintiff the real property she had conveyed to it as indemnity; also declared a lien upon the leased property for the amount of the judgment in favor of the plaintiff.

An examination of the various written instruments introduced in evidence and entered into in conjunction with the lease discloses a very careful attempt on the part of the lessor to protect himself against loss in case of a forfeiture of the lease.

First, the lease provides for a re-entry by the lessor in case of a failure to pay the rent.

Second, the agreement whereby the \$5,000 was deposited with the lessor as a loan, provided that the note and deed of trust should be canceled and delivered up in case the lease was forfeited.

Third, the bond for \$3,000 provided that if the rent was not paid in accordance with the lease, or if any of the obligations of the lease was broken, the amount of the bond should be forfeited to the lessor, and that the amount should be considered as liquidated damages and not as a penalty.

After these instruments were executed, the lessee took possession, paid the rent as agreed for five or six months, and defaulted, by paying only a part of the Feb-

ruary, 1910, rent. The lease was made May 1, 1909, but payment of rent, by agreement, did not begin until the building was finished that the lessor was to erect upon the leased premises. The lessee was notified when this default occurred, in writing, that unless the rent was paid as required by the lease, the property must be vacated, and in which notice the lessor declared a forfeiture of the lease, and stated that he would take possession of the property, unless the rent was paid. The lessor and Mrs. Agnew, as assignee, aforesaid, had some conversation after this notice was given, in which it was tacitly understood between the two that the lessee would surrender the property and the lessor would accept the same. Thereafter, the lessor took entire and complete control of the property; the lessee abandoned it, and the lease, the lessor altered the second story of the building, took over the tenants that were occupying portions of it, collected rents from them himself, made leases with subsequent tenants, and in all other respects took entire control of the property as of his first and former estate, as the lease provided he could do.

Could he do this, and, at the same time, claim the deposit and the benefit of the bond? The answer, on first impression, would be in the affirmative, but the law is plain between landlord and tenant that, when the lessor re-enters and resumes absolute control of the property, on account of a default of the lessee in the payment of the rent, or as to any other obligation of the lease, or by reason of an abandonment or surrender of property by the lessee and acceptance thereof by the lessor, the lease is thereby canceled, and, by reason thereof, both parties are released from any subsequent obligation or liability under the lease.

“The surrender of the leased premises by the tenant extinguishes the relation of landlord and tenant, and releases him from liability for rent accruing thereafter.

* * * Surrender may be had by express agreement of the parties or by operation of law, and in the latter case whether or not a surrender has been effected ordinarily depends upon the intention of the parties."—24 Cyc., 1162.

"A landlord is not, on the abandonment of the demised premises by the tenant in violation of his contract, required to relet for the protection of the latter, but may at his election suffer the premises to remain vacant, and recover his rent for the remainder of the term, or, he may on the other hand elect to enter and determine the contract, and in the event of such re-entry he is entitled to recover only for the rent then due."—24 Cyc., 1164, 1165.

"Where a tenant deposits money as security for the payment of rent and the performance of the covenants of the lease, and is dispossessed during the term for failing to pay rent, the deposit is not forfeited; the tenant is entitled to recover the balance remaining after deducting therefrom the amount of damages suffered by the landlord from the breaches of covenants on his part prior to the dispossession. Even in some cases where the lease recites that the deposit is made as liquidated damages, the tenant has been held to be entitled to the surplus."—24 Cyc., 1143, 1144.

In the case of *Carson v. Arvantes*, 10 Colo. App., 382, 387, 50 Pac., 1080, the court said:

"An agreement by the tenant to abandon possession of the demised premises and one by the landlord to resume his occupancy and the execution of this agreement in law amount to a surrender of the term. Whenever this happens the lease is terminated and the obligation of the tenant to occupy or to pay rent is thereupon determined. This is familiar law with reference to leasehold rights and is thoroughly well settled.—*Talbot et al. v. Whipple*, 96 Mass. (14 Allen), 177; *Kneeland v. Schmidt*, 78 Wis., 345, 47 N. W., 438, 11 L. R. A., 498; *Hegeman v. McAr-*

thur, 1 E. D. Smith (N. Y.), 147; *Rice v. Dudley*, 65 Ala., 68; *Buffalo County National Bank v. Hanson*, 34 Neb., 455, 51 N. W., 1035. Under this rule the landlord, of course, has his election between one of two remedies. He may leave the premises vacant, sue for the rent for the balance of the term and enforce any security which the lessee gave to insure performance. If he chooses he may likewise terminate the contracts and enter a claim for rent up to the date of the abandonment and the acceptance of possession. He is not at liberty to take possession of the premises, and at the same time insist that the contract is in force and recover rent for the balance of the term."

Our supreme court, in the same case, appealed to it, 27 Colo., 77, 83, 59 Pac., 737, said:

"Any agreement between landlord and tenant manifesting the intention of both to terminate a lease, which is unequivocally acted upon by each, effects its cancellation, and Hallet being released from all liability under the lease, it follows that the security pledged for the performance of his contract was discharged; and, therefore, appellants could no longer insist upon holding a deposit for the performance of a contract which by their own act they had canceled.—*Buffalo County Bank v. Hansen*, 34 Neb., 455, 51 N. W., 1055; *Taylor on Landlord and Tenant*, sec. 507; *Talbot v. Whipple*, 96 Mass., 177."

See also *Rauer's Law & Collection Co. v. Third Street Improvement Co. et al.* (Cal. App.), 131 Pac., 77; *D'Appuzo v. Albright* (Sup.), 76 N. Y. Supp., 654; *Cunningham v. Stockon*, 81 Kan., 780, 106 Pac., 1057, 19 Ann. Cas., 212; *Chaude v. Shepard*, 122 N. Y., 397, 25 N. E., 358; *Baxter v. Heimann*, 134 Mo. App., 260, 113 S. W., 1152; *Brigham Young Trust Co. v. Wagener*, 13 Utah, 236, 44 Pac., 1030.

It makes but little difference in what way the lease was terminated, whether by re-entry and a resumption of possession by the lessor, or whether by a surrender on the part of the lessee and an acceptance thereof by the

lessor, because, in either case, the relation of landlord and tenant would be terminated.—*Rockwell v. Eiler's Music House*, 67 Wash., 478, 122 Pac., 12, 14, 39 L. R. A. (N. S.), 894.

In view of the decision of the supreme court in the case of *Carson v. Arvantes*, 27 Colo., on page 81, it is unnecessary for us to determine whether the deposit made in this case by the contract, or the indemnity of the bond, should be considered as liquidated damages or as a penalty. The court of appeals held, in that case, where the lessee deposited with the lessor \$250 and took a receipt which thereafter formed the security contract, that said contract provided for a penalty, and not for liquidated damages. The contract, so the court said, "in general terms recited the receipt of \$250 as security that the lessee would remain in the store until the end of the lease, paying rent in advance, and provided that if they moved out and did not pay the rent according to the agreement, the deposit should be forfeited and become the property of the lessor." But the supreme court, in the same case, said:

"The only question presented is, did the court of appeals determine the cause on correct principles of law applicable to the facts? In determining this question, however, we do not deem it necessary to decide whether the agreement with respect to the deposit was one of liquidated damages, in case of a breach of the contract of lease, or whether it was security for damages which appellants might sustain in case the terms of that agreement were not complied with, for it could make no difference how it should be treated in this respect, if, as a matter of fact, the lease was terminated by the acts of the parties, and the rent paid up to the date when it was so canceled."

There is no conflict in the testimony as to the lessor's declaration of a forfeiture and that he demanded and re-

sumed absolute and adverse possession and control of the property, and accepted the surrender thereof; and, having done this, under the ruling of the supreme court above cited, it is unnecessary to determine whether the deposit is liquidated damages or penalty, because resumption of possession which canceled the lease canceled every claim for damages accruing subsequent to such cancellation, except such damages, however, as may have accrued up to and prior to such cancellation. And, whether the deposit was understood to be as liquidated damages or a penalty in the beginning, such acts of the lessor, by operation of law, left the deposit in his hands free from the grasp of the contract of deposit, and the money of the lessee; and, even if it were contended that the lower court erred in allowing the balance of the February rent to be deducted from the deposit, there is no contention here, and no cross-error assigned thereupon.

An examination of the lease and the other instruments accompanying it authorizes the conclusive presumption that the parties never contemplated any damages that would accrue upon any breach except that of a forfeiture of the lease and the consequent vacation and abandonment of the premises. The lessor was amply secured for such breach and would have been fully protected if he had not resumed possession, and thus elected to save himself in this way, rather than rest upon the right he had to refuse to accept the surrender of the property, and to rely upon the deposits for his security or damages. He had two means provided: one, by the terms of the lease under which he could declare a forfeiture and resume possession; the other, by refusing to accept the surrender, and resorting to the deposits; he chose the former, and this debarred him from any claim under the latter.—*Carson v. Arvantes, supra*.

The appellant, however, offered to prove that there was another damage accrued prior to the forfeiture, on

account of alterations of the second story of the building, made after the forfeiture, that cost between \$3,500 and \$4,000; but the lower court excluded this testimony on the ground that it was extraneous evidence, and tended to change the terms of the written agreements. The enforcement of the parol testimony rule may sometimes inflict great hardship and the rule is oftentimes more honored in the breach than in the observance, but, nevertheless, it is a wholesome general rule, not to be broken except by the exceptions, which are numerous, that usually accompany the rule itself. This proof, however, does not come within any exception, and the admission of this parol proof, that the lessee agreed that the deposit should cover the necessary cost of alterations in the building, would be adding another penalty for the breach of the lease not contained in it or in any of the contemporaneous agreements, and a damage not common or natural to the forfeiture of the lease, nor included in its general terms. If the lessor intended this damage to be provided for, it would have been easy to have inserted it in one or more of the agreements. The lessor had the assistance of counsel, and no doubt it was deliberately concluded that such damage was taken care of by the strict terms of the instrument providing for a breach of the lease on failure to pay the rents; and such was the case, if the lessor had refused to accept the surrender of the property, and rested upon his rights under the lease and the other contracts of security. He could have given notice to, or agreed with, the lessee that he would take charge of the property as agent, and that he would hold it, the lessee, for the difference between the rent actually received and what the lease called for, less expenses, during the remainder of the term; and, in such case, could have held all of the deposit as liquidated damages, or enough thereof as a penalty, to cover the difference, as damages for the breach; or he could have done what he did, declare a

forfeiture, take possession and control, and save himself from damage in that way. He could not do both. Therefore, it was not error for the lower court to exclude parol testimony as to the alteration of the building, because its admission would introduce another element or item of damage that the deposit should cover, not in any way named in, referred to, or within the meaning of, the terms of the written agreements, but duly taken care of and provided for in the strict provisions concerning forfeiture for non-payment of rent. Citation of authority would not aid us on this point, as is said by Prof. Wigmore:

“Such is the complexity of circumstance and the variety of documentary phraseology, and so minute the *indicia* of intent, that one ruling can seldom be of controlling authority or even of utility for a subsequent one. The opinions of judges are cumbered with citations of cases which serve no purpose there except to prove what is not disputed—the general principle. Other than in relation to some of the foregoing topics which have broad and uniform bearings, individual rulings can have little value as precedents unless the entire detail of the documents and circumstances is set forth; and an abbreviation of them is therefore more likely to mislead than to profit. The application of the rule should in almost all instances be left to the trial judge’s determination.”—4 Wigmore on Evidence, sec. 2442, p. 3443.

A careful examination of these instruments discloses that the lessor, through his counsel, deliberately concluded and believed that the provision, in the lease, and in the other instruments, for a forfeiture on account of non-payment of rents, for the term, would fully protect the lessor in all respects, including damages by reason of alterations of the building, if such damages were contemplated. This conclusion of the lessor and his counsel was a correct one, because it was no doubt so concluded with the understanding and intention that the lessor should

stand upon the terms thus provided for in case of a forfeiture, and not resume possession of the property and cut himself out of any right to rely upon the deposits. If this testimony were admitted to prove that the alteration of the building was one of the items of damage provided against, then the parol testimony rule would be wholly abrogated, because if there is any one of its restrictions more inviolate than another, it is the one that a party may not add to the terms of a written agreement by parol evidence, and, especially, to add another obligation to those already in the writing as an addition to the burden upon the opposing party. Furthermore, this rejected testimony would prove nothing more than that the lessor intended to provide for a forfeiture of a sufficient sum to pay him for remodelling the building; but when the contracts were drawn, all mention of the remodelling was omitted, and purposely so omitted, no doubt, because it was intended that the forfeiture itself would cover all damages incurred in remodelling. Mr. Mel E. Peters, who drew these instruments, and who testified for the lessor, stated, in his testimony, in answer to the question, "But you never incorporated in the contract which you prepared, that language, did you?" (meaning the language as to remodelling). A. "The intention in drawing the contract was to draw it so in case of a forfeiture of the lease that this should be paid as liquidated damages, whenever the covenants of the lease or a fracture of the covenants of the lease should end in a forfeiture of the lease—would result in a forfeiture of the lease, then the money should be paid."

All of Mr. Peters' testimony goes to show that he believed, when the contracts were drawn, that a forfeiture for non-payment of rent would entitle the lessor to claim the deposits as liquidated damages, or at least as security for the damages incurred; but as the lessor took possession of the property, and thereby elected to protect him-

self in a different way, oral testimony concerning the element of damage concerning the remodelling was inadmissible.

Furthermore, the moment this evidence is considered, so easily and readily reducing the damages to an exact sum, the contention of appellants as to liquidated damages is destroyed; because the courts, ever astute to discover a reason for disallowing a forfeiture, have held that, if there is a doubt, and the damage is easily computed or readily reduced to an exact amount, the parties never intended anything more than a penalty.—*Bilz v. Powell*, 50 Colo., 482.

Both parties in this case rely upon the harsh effect of two recognized rules that have been frequently enforced: one, forfeiting as liquidated damages a certain sum of money agreed upon regardless of what the damages may be in fact; the other, a rule peculiar to the law of landlord and tenant whereby the landlord may forfeit his right to claim a forfeiture against his tenant; and, while these rules are neither absolute nor of immaculate or miraculous conception, but merely applied in many adjudicated cases as a means to arrive at justice between the parties, it is not found necessary to disturb them in the conclusion reached.

The judgment of the lower court is therefore affirmed, except in so far as it affects the bond for \$3,000, the lower court having denied an appeal as to that part of its judgment.

CUNNINGHAM, Presiding Judge, dissenting:

Enough appears in the majority opinion to make it plain that in the judgment of the writer of the majority opinion, it is based upon authority, rather than upon reason, for he says, in effect, that on first impression the conclusions therein arrived at do not comport with reason. One's first impressions are not infrequently his best impressions. It must be conceded that our courts

have gone a long way in matters pertaining to the law of landlord and tenant, and in matters pertaining to penalties and liquidated damages, in overthrowing the intention of parties to agreements of this sort, and making, and then enforcing, contracts which the parties themselves had not, as a matter of fact, entered into. But I know of no well-considered case wherein the rule is announced that the interpretation which the parties to a contract have placed upon it, when clearly established, will not be enforced, where the same is reasonable and does not offend against public policy. There was evidence offered in this case, not alluded to in the majority opinion, which tended strongly to show (indeed, to my mind, conclusively shows) that both parties to the contract of lease in this case fully understood that the \$5,000 referred to in the majority opinion was to be treated as liquidated damages and was to be retained by Wilson, and by him used in the remodelling of the building, if it became necessary, because of the violation of the terms of the lease by the Psychic Society, to remodel the same. The trial court admitted this evidence when it was offered, but later struck it out and refused to consider it for any purpose. Therein the trial court, in my judgment, clearly committed reversible error, and for that reason I cannot yield assent to the conclusions reached in the majority opinion.

Decided October 14, A. D. 1913. Rehearing denied November 11, A. D. 1913.

[No. 3732.]

RYAN ET AL. V. GEIGEL ET AL.

1. JUDGE—*Formerly Acting as Attorney for Party—Disqualification.* One who had acted as attorney for an administrator in procuring his appointment was afterwards county judge of the same court in which the administration was pending. Several years after his professional connection with the administration had terminated, a petition was presented by the administrator for leave to sell certain lands of the intestate.

Held that the petition was a special proceeding, separate and distinct from the administration, and that nothing in the statute (Code, sec. 464) disqualified his honor from entertaining it.

2. EXECUTORS AND ADMINISTRATORS—*Sale of Lands—Purchase by Administrator's Attorney—Conspiracy.* The attorney of the administrator purchased lands at the administrator's sale. Less than two years afterwards he conveyed to the administrator. The heirs, suing to vacate the sale and subsequent conveyances, contended that the sale to the attorney was the result of a conspiracy to enable the administrator to evade the statute (Rev. Stat., sec. 7183). Judgment below for defendant.

The evidence examined and held not sufficiently clear and conclusive to require the court to vacate the judgment of the court below, where the judge presiding had the advantage of observing the demeanor of the witnesses in giving testimony.

Appeal from Garfield District Court. HON. JOHN SHUMATE, Judge.

MESSRS. VAILE, McALLISTER & VAILE for appellants.

Mr. E. L. CLOVER for appellees.

CUNNINGHAM, Presiding Judge.

The appellants, who were plaintiffs below, were the brothers and sisters and sole heirs at law of Michael D. Ryan, deceased. The appellee Hays was the administrator, with the will annexed, of the estate of the said Michael D. Ryan, deceased. For the purpose of paying the debts of the said Ryan's estate, Hayes, as administrator, sold certain real estate belonging to the said estate. Appellee Dollison, who was the attorney for the administrator, purchased this real estate at the administrator's sale, paying therefor \$800. Shortly after obtaining an administrator's deed for the land, Dollison rented it to Hayes, the administrator. A little less than two years after Dollison rented the land to Hayes the latter, while still administrator of the estate, purchased the land from Dollison, paying \$1,200 for it. A little more than two years after Dollison sold the land to Hayes, the latter sold it to the appellee Geigel for \$5,000. The appellees, Darch

and James, were at different times the public trustee of Garfield County, and because of a trust deed made to them, in their official capacity, by Geigel, to secure a part of the purchase price which he was to pay to Hayes for the land, these two appellees were made defendants. Noonan was the county judge at the time the proceedings were had in the county court to sell the land, and early in the administration of the estate, and before his election as county judge, Noonan acted as attorney for the administrator in the preparation of the first administration papers. Appellants brought their action in the district court to set aside these various deeds, and have themselves declared to be the owners of the said real estate, subject only to the debts of the said Michael D. Ryan. In their bill plaintiffs charge fraud and conspiracy on the part of the said Hayes, Noonan, and the appraisers of the real estate, and Dollison, who purchased the same. Although a jury was empanelled to try the cause, at the close of all the testimony the court discharged the jury, as he had a clear right to do, it being an equity case, and rendered judgment for the defendants, from which judgment this appeal is taken.

1. The evidence offered on behalf of the appellants for the purpose of establishing a conspiracy was wholly circumstantial, and consisted, among other things, in showing that the land was bought by Dollison while attorney for Hayes, the administrator, for \$800, and in less than four years thereafter that it sold for \$5,000. It is contended from this, and other facts shown not necessary to detail, that there was an arrangement between Dollison and Hayes at the time the land was sold that Dollison should buy it for Hayes in order to avoid the inhibitions of the statute, which disqualify administrators from becoming purchasers, and thereafter transfer it to the administrator. In other words, that the purchase of the land by Dollison was a mere subterfuge. Appellants

also showed that in his affidavit, whereby he procured an order to make service by publication on the heirs of Michael D. Ryan, Hayes, the administrator, stated that he did not know the postoffice address of said heirs. There was evidence tending to show that Hayes possessed such knowledge, at least as to some of the heirs, or might readily have learned their address, since he, Hayes, and the Ryan children were distantly related and had grown up in the same neighborhood in Tipperary County, Ireland. However, Hayes had not lived in Ireland for about twenty-five years, and some of the Ryan children, at least, had within that time moved to America. No good purpose can be subserved by a full discussion of the evidence offered by both parties to this action, or in incorporating in this opinion an argument based thereon. The statutes in force at the time of the sale of this property did not require the administrator, in a proceeding to sell real estate, to set forth in his petition or affidavit for publication the postoffice address or residence of the parties defendant. Since this proceeding, the statutes in this respect have been materially amended, and now closely resemble the divorce and other statutes governing constructive or substituted service.

2. To show that Dollison, at the time he purchased the land, paid its full market value, defendants introduced two of the appraisers (the third being dead) and three other witnesses apparently familiar from experience with land values. So far as we can discover from the record, these were all disinterested and intelligent witnesses. All of them testified that the land brought its full market value. No evidence whatever was introduced by the plaintiffs, appellants here, to contradict this evidence. Seemingly the appellants rested their case on this point solely upon the circumstance that the land had, four years after Dollison paid \$800 for it, been sold for \$5,000. At the time the land was bought by Dollison it

was unimproved, or practically so. At the time it sold for \$5,000 it was in a high state of cultivation, having a growing crop upon it worth \$1,600; buildings had been constructed, and the land had been brought under irrigation. Under these circumstances we are clearly bound by what must have been the findings of the trial court, viz.: that the land brought at the administrator's sale, which was a public one, at which there was present at least one other bidder, its then full market value.

3. It is urged on behalf of appellants that Noonan, the county judge, having been the attorney for the administrator, Hayes, was disqualified under code section 464, Revised Statutes, to enter the order for the sale of the land. The pertinent portion of section 464 reads as follows:

“A judge shall not act as such in any of the following cases: in an action or proceeding * * * when he has been attorney or counsel for either party in the action or proceeding, unless by consent of all the parties to the action.”

This case has been before the supreme court, and, in *Ryan et al. v. Geigel*, 39 Colo., 355-358, 89 Pac., 775, the court, speaking through the late Chief Justice Steele, said:

“The proceeding to sell real estate is separate and distinct from the administration of the estate proper, and is a special proceeding, recognized by the statute.”

Judge Noonan's professional connection with the estate had entirely ceased long before proceedings were instituted in this case to sell the real estate. For several years after Noonan's election to the office of probate judge the title to the land in question was involved in an adverse proceeding in the land office. Inasmuch as Judge Noonan had nothing whatever to do, as an attorney, with the proceeding to sell the real estate, there was nothing in his early professional connection with the administra-

tion proceeding that disqualified him from later, as county judge, entering the order in question.

There are other technical irregularities in connection with the execution of the administrator's deed which are urged on behalf of the appellants, but we do not regard them as vital.

Upon the whole record we cannot say that the evidence introduced by the appellants was so clear and conclusive as that it becomes our duty to set aside the judgment of the trial court, who heard the testimony, and had the advantage of observing the demeanor of the witnesses while on the stand.

The judgment of the trial court is affirmed.

Decided October 14, A. D. 1913. Rehearing denied December 8, A. D. 1913.

[No. 3749.]

CITY AND COUNTY OF DENVER ET AL. V. BORKE.

1. NEGLIGENCE—*Duty of Those Prosecuting Work Upon the Streets of the City*, to keep danger lights burning during the night, wherever the public ways are obstructed by their work.
2. APPEALS—*Verdict Upon Evidence Sufficient, Though Conflicting*, is conclusive.
3. — *Questions Not Presented Below*, will not be considered.

Appeal from Denver District Court. HON. CARLTON M. BLISS, Judge.

Mr. WILLIAM H. DICKSON for Municipal Construction Company.

Mr. HENRY A. LINDSLEY, Mr. F. W. SANBORN for City and County of Denver, appellants.

Mr. W. F. HYNES, Mr. PHILIP HORNBEIN for appellee.

CUNNINGHAM, Presiding Judge.

Appellee recovered judgment for personal injuries which she received by falling over a mound of earth or dirt that had been placed, as she alleged, by the appellant, The Municipal Construction Company, at the intersection of Sixth avenue and Race street at a point in said intersection in a direct continuation of the sidewalk on Race street, and about midway between the curb of said Sixth avenue and the car track used by cars going towards the city.

From the evidence it appears that the plaintiff, about the hour of nine o'clock P. M., was proceeding south along the west side of Race street for the purpose of taking a street car at Sixth avenue, where that avenue and Race street intersect. At the intersection of said streets and between the curb and the car track she alleges that she ran upon a pile of dirt, fell backward, and broke the large bone of her left leg just above the ankle. It was stipulated on the trial that the pile of dirt was about three feet high. Indeed, there were two piles of dirt, the first one of which plaintiff ran into, but passed over without serious mishap. Whether the dirt was placed upon the sidewalk, or upon the parking area, and whether there were lights stationed at the place to warn pedestrians, and the responsibility of the construction company for placing the dirt where it was, are all matters in sharp conflict, and the findings of the jury on these material facts cannot be disturbed. That it was the duty of the construction company, while prosecuting the work in which it was engaged, viz.: putting in curbing, to keep danger lights burning during the night, is not in dispute. Indeed, employees of the construction company called as witnesses, testified that it was their, the witnesses', duty to see to it that such lights were set out and kept burning all night.

We have discovered no prejudicial error in the rulings of the trial court on the introduction of testimony. Indeed, but few objections were made while the evidence was being received. Error is assigned to the giving of certain instructions, which we do not deem it necessary to discuss, except perhaps as to instruction number 10, wherein the court instructed the jury that under certain conditions it might take into consideration:

“Also impairment of her earning capacity in the future, provided that you believe her earning capacity will be impaired.”

It will be observed that in the clause quoted from this instruction the court omitted the phrase, “from the evidence,” which appellants properly contend ought to have followed and modified the verb, “believe.” At the time this instruction was given, appellants made no effort whatever to call the court’s attention to this omission. Three distinct objections were made to this instruction, but none of them go to the omission of the qualifying phrase which appellants now insist renders the instruction fatally defective. We are unwilling, under this state of the record, to reverse the case and require a retrial of the issues.

Judgment Affirmed.

[No. 3760.]

GIBSON V. WAGNER.

1. JUDGMENT BY DEFAULT—*Upon Substituted Service, Based Upon an Insufficient Affidavit*, disclosed by the record, is a nullity.

2. SUMMONS—*Publication—Affidavit*. No provision of the code allows the statement on information and belief of any of the matters required to be stated in an affidavit to secure the service of summons by publication. The statement as to defendant’s postoffice address, or that it is not known, must be made in positive terms.

3. — *Affidavit as to Defendant's Residence.* There were several defendants, one of them a Colorado corporation which could reside nowhere but in Colorado. The affidavit to support an application for the publication of the summons stated that all these defendants "either reside out of this state, or have departed thence, without any intention of returning, or conceal themselves so as to avoid service of process." Held that these averments, as applied to many defendants, individual and corporate, taken in connection with the failure to give the postoffice address of any defendant, or to state that the address was unknown, suggest an effort to conceal, rather than to provide, information of the suit. As to a Colorado corporation, it was noted that the affidavit could not be true; that such a corporation cannot depart the state nor conceal itself. And, it appearing that this corporation, being trustee in a deed of trust under which the defendant claimed title to the lands in litigation, it was not reasonable to suppose that if the summons had reached the corporation it would not have been communicated to the defendant.

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

Mr. ISAAC PELTON for the appellant.

Messrs. MUNSON & MUNSON for the appellee.

KING, J., delivered the opinion of the court.

The judgment appealed from was rendered in an action brought by the appellant, Gibson, in the usual form under the code, to quiet title to certain lands in Yuma county. Upon trial it was admitted, by stipulation of counsel, that the plaintiff was the owner of said lands, unless his title had been extinguished by a certain decree of the county court of said county, pleaded in the answer as an adjudication of the said title in favor of defendant and against the plaintiff herein. It was also admitted that the plaintiff herein was a defendant in said cause; that the decree recited that he had been duly served with summons, but that said service, if made at all, was by publication. Plaintiff contends that the affidavit for publication of summons was defective and wholly insufficient, in that it neither gave the postoffice address of said defendant nor stated that his postoffice address was unknown to the affi-

ant, and further that the affidavit contained no sufficient statement of the non-residence of said defendant as required by law; that by reason of the insufficiency of the affidavit, the judgment relied on was void.

1. The law is well settled that, in order to give the court jurisdiction by substituted service through publication of summons, the statutory requirements must be strictly complied with, and that nothing excuses omissions or insufficient statements.—1 Black on Judgments (2nd ed.), sec. 232; *Sylph M. & M. Co. v. Williams*, 4 Colo. App., 345, 36 Pac., 80; *Beckett v. Cuenin*, 15 Colo., 281, 25 Pac., 167, 22 Am. St. Rep., 399; *Trowbridge v. Allen*, 48 Colo., 419, 110 Pac., 193; *Empire R. & C. Co. v. Coldren*, 51 Colo., 115, 117 Pac., 1005. The postoffice address of the defendant Gibson, and of a number of the other defendants, was not given. There was no direct or positive statement that the postoffice addresses of such defendants were unknown, but as to them the affidavit reads: "Affiant is informed and believes * * * that the postoffice addresses of the other of the hereinbefore named defendants are unknown to affiant." There is no provision of our code permitting an affidavit for publication of summons to be made upon information and belief as to any of the matters required to be *stated* therein. There seems to be no direct holding upon that question by the courts of this state, except that in *Sylph M. & M. Co. v. Williams*, 4 Colo., 345, 36 Pac., 80, it is said that the affidavit for publication may not be made on information and belief by the attorney in the case, and we think that rule would apply with equal force to the plaintiff; but whatever may be the rule as to some of the statements required to be made in such affidavit, concerning which, in the nature of things, plaintiff cannot have positive knowledge, it is clear that, as to the requirement that the plaintiff shall give the postoffice address of the defendant, if known, or state that his postoffice address is not known to the affiant,

such statement must be made positively, and not on information and belief. There is nothing in the nature of things that would admit of that statement's being made upon information and belief, and to so make it is a palpable evasion of the statute, instead of a strict compliance therewith. The language used in the affidavit is not even a statement of the fact on information and belief. Such an allegation affords no foundation for an order for publication of summons, and will not support a judgment the validity of which depends upon service so made.

2. The statute makes requisite, as a condition precedent to an order for constructive service, an affidavit stating that defendant resides out of the state, or has departed from the state without intention of returning, or has concealed himself to avoid the service of process. The affidavit in this case states that the defendants Gibson, The Colorado Security Company, The American Mortgage Trust, Limited, John S. Gibbons and Fannie Blackmore "either reside out of the state of Colorado or have departed therefrom without intention of returning, or conceal themselves to avoid the service of process." The appellant contends that the averment of all these matters in the alternative or disjunctive is not a direct statement as to any of them, and we think the contention is right. However, assuming, but not deciding, that under some conditions, as applied to an individual defendant, these several allegations may be stated together in the disjunctive or alternative form, we think the averment as here made applied to many defendants, both individual and corporate, taken together with the failure to give the postoffice addresses of any of said defendants, or to state that they were unknown, strongly suggests an effort to conceal all, rather than to furnish any, information by which notice of the suit to divest the title of defendants and vest it in the plaintiff, would possibly reach any of the defendants. As to the Colorado Securities Company,

a domestic corporation, the omnibus affidavit cannot be true. Its place of residence is within the state, and cannot be elsewhere; it cannot depart therefrom, and, as a corporation, cannot conceal itself to avoid service of process; its articles of incorporation, on file in the office of the secretary of state, must, of necessity, state the town and county in which its principal office is located, which, for the purpose of service of summons, is the town and county of its residence, unless by statute otherwise provided, and likewise its general postoffice address; and if such fact and such address had been stated in the affidavit, a copy of the summons would have been mailed to this defendant. Inasmuch as it appears from the record that this corporation was the beneficiary in the deed of trust under foreclosure of which Gibson claimed title, it would not be unreasonable to presume that, if a copy of the summons had reached the company, notice of the proceeding might have been communicated to Gibson, its assignee. The affidavit, as a whole, is circumstantial and positive as to matters which the statute does not require to be stated, but as to matters which are material, its averments are indirect and ambiguous, or on information and belief.

3. Counsel for appellee insist that, even though the affidavit for publication of summons be insufficient, the decree cannot be held void or set aside in this proceeding, which they denominate a collateral attack. Where, as in this case, the insufficiency of the affidavit is affirmatively disclosed by the record, the judgment based upon substituted service is a nullity, and may be attacked collaterally by anyone whose rights are affected thereby.—*Trowbridge v. Allen, supra*.

The judgment will be reversed and the cause remanded, with direction to the trial court to enter judgment in favor of the plaintiff, quieting his title.

Reversed and Remanded.

[No. 3694.]

POYZER v. BEARDSLEY.

Judgment affirmed on the authority of previous decisions.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, Messrs. FERRIS & IDDING for appellant.

Mr. ISAAC PELTON for appellee.

KING, J., delivered the opinion of the court.

This was an action commenced by appellee to quiet his title. All matters involved herein have been so frequently decided by the supreme court and by this court adversely to the contention of the appellant, that a written opinion giving reasons for the conclusion reached would serve no useful purpose, and is therefore dispensed with. The judgment is affirmed.

Affirmed.

[No. 3716.]

McKIBBIN v. PAUL.

CONVEYANCES—*Acknowledgment in Another State.* A conveyance of land situate in Colorado may be acknowledged before any of the officers named in the statute (Rev. Stat., sec. 684). If acknowledged before any other officer, the certificate of acknowledgment must be accompanied by the certificate of the clerk of some court of record, under the seal of the court, affirmatively showing that by the laws of such other state such officer is authorized to take and certify such acknowledgment. The statement need not be in the language of our statute, but must be a clear and unequivocal statement of such authority. No presumption to support it will be indulged.

The mere statement in the certificate "that full effect and credit ought to be given" to the acts of the officer certifying the acknowledgment is not a compliance with the statute.

Appeal from Phillips District Court. HON. H. P. BURKE, Judge.

MESSRS. ALLEN & WEBSTER for appellant.

MESSRS. MUNSON & MUNSON for appellee.

HURLBUT, J., rendered the opinion of the court.

June 22, 1908, C. E. Paul, as appellant, filed his petition in the district court of Phillips county, praying the court to determine and declare his title to the S. E. $\frac{1}{4}$ of Sec. 31, Twp. 8 N., R. 42 W., situate in Phillips county, Colorado, and for an order requiring registration of the same. The petition was founded upon an act of the legislature, Session Laws 1903, page 311 *et seq.*, sometimes spoken of as "The Torrens Land Registration Act." The petition appears to conform to the statute, and alleges in part that the deed conveying the land from Frederick D. Hasler to appellant McKibbin was filed for record June 5, 1908, but the same was of no force or effect against applicant because he was a *bona fide* purchaser for value, without notice of the deed to McKibbin.

To this petition, McKibbin, appellant, filed an answer, alleging among other things that the applicant had no legal or equitable right to have his title registered; that he, McKibbin, owned all right, title and interest in and to the land; that the applicant Paul claimed an interest in the premises by virtue of a tax deed which was void on its face, and void in fact, for the reason that no proper notice of the sale of the land had been given; and that the land was sold at tax sale to Phillips county on the first day thereof. It is further alleged that applicant also claims title by virtue of a quit claim deed from one F. D. Hasler, patentee, to S. H. Johnson, dated February

9, 1908, and a warranty deed from said Johnson to applicant; that, prior to the execution of the deed from Hasler to Johnson, Hasler, the then patent owner of the premises, on December 5, 1907, executed his warranty deed to McKibbin for the land; that neither Johnson nor applicant were *bona fide* purchasers of the land as against McKibbin's unrecorded deed; and that defendant is the sole owner of the premises against whom there exists no enforceable claim, estate, interest or title, in and to the premises.

Applicant by replication denied all new matters alleged in McKibbin's answer.

There was also an answer filed to applicant's petition by one E. N. McPherrin, claiming an interest in the land by virtue of two mortgages, but as the issue tendered is not involved in this appeal no further notice will be given to it.

The case was tried to the court and decree rendered in favor of applicant, therein adjudging the title to the land to be in him and ordering its registration, subject to the two mortgages under which McPherrin claims, declaring, however, that such mortgages were not a lien upon the premises. This appeal is prosecuted from said decree.

Appellant in the first paragraph of his brief informs us that he will discuss but one question on this appeal, being that which relates to the ruling of the trial court in excluding from evidence the said warranty deed from Hasler to appellant. We will take appellant at his word and devote our attention solely to this question. As above shown, this deed bears date December 5, 1907, and purports to have been executed and delivered that day. The grantor therein is F. D. Hasler, and the grantee R. G. McKibbin, and it is in every respect a warranty deed. It purports to have been acknowledged in Greene county, state of Indiana, on the day of its date, by Lafe Scott,

justice of the peace in and for that county. The deed has attached to it a certificate by Clyde O. Yoho, clerk of the district court of said Greene county, and reads as follows:

“State of Indiana, Greene County, ss.

“I, Clyde O. Yoho, Clerk of the Circuit Court, within and for Greene County, State of Indiana, do hereby certify that Lafe Scott, whose certificate of acknowledgment appears to the instrument of writing to which this is attached, was on the date and at the time of making such certificate, to wit, the 5th day of December, 1907, a Justice of the Peace (he was appointed to take oath of office September 29, 1896, and has been acting since that date to the present time) within and for said Greene County, duly commissioned and qualified, whose term of office began on the 29th day of September, 1896, and will expire on the.....day of....., 19.., and that full effect and credit ought to be given to his official acts, and that the signature purporting to be his is genuine.

“IN WITNESS of which I have hereunto affixed the seal of said Court and subscribed my name at Bloomfield, Indiana, this 23d day of December, A. D. 1907.

“(Official Seal) CLYDE O. YOH0.

“Filed for record the 5th day of June, A. D. 1908, at 11:30 o'clock A. M.

“LEON KEPLER, Clerk.

“By Mattie Slagle, Deputy.”

When the record of the deed was offered in evidence applicant objected to its introduction for several reasons, the only one necessary to notice being “that there is no certificate attached to this, as provided by our statute, showing the authority of the justice of the peace to take acknowledgments in Indiana where the deed is executed.” Section 684, Revised Statutes, 1908, refers to the manner and method of acknowledging or proving written instruments purporting to convey land or any interest therein,

located in this state. The first subdivision of the section enumerates what officials have power to take acknowledgments of such instruments when executed within this state; the third, how acknowledgments are to be taken in foreign countries and beyond the limits of the United States. The second enumerates those who are authorized to take acknowledgments of such instruments out of this state, but within the United States (as in the case before us). In the list of officials enumerated as possessing such authority, justices of the peace do not appear. After enumerating by official title what officers may take such acknowledgments, the statute continues:

“before any other officer authorized by the laws of any such state or territory to take and certify such acknowledgments; provided there shall be affixed to the certificate of such officer, other than those above enumerated, a certificate of the clerk of some court of record of the county, state or territory, wherein such officer resides, under the seal of such court, that the person certifying such acknowledgment is the officer he assumes to be; that he has the authority, by the laws of such state or territory, to take and certify such acknowledgment, and that the signature of such officer to the certificate of acknowledgment is the true signature of such officer.”

The record fails to disclose any other proof of the execution of the deed than that contained in the deed itself, leaving but one question to decide, viz.: Was the certificate of Yoho, clerk of the circuit court, sufficient in form and recital to comply with our statute and render the acknowledgment effective as proof of the execution of the deed? From the statute above quoted it is plain that the legislature intended to provide a method of taking acknowledgments to written instruments, not only in our own state, but in every state or territory of the Union, as well as in foreign countries. A justice of the peace not being mentioned in the statute as a proper offi-

cer before whom acknowledgments may be taken in a sister state or territory, it becomes necessary, by force of the statute, that if such official in another state assumes to certify an acknowledgment of a deed conveying real property in Colorado, the certificate of a clerk of a court of record in such state must, under the seal of the court, affirmatively show that the justice of the peace is authorized under the laws of that state to take and certify such acknowledgment. The omission of such a statement in the clerk's certificate renders the purported acknowledgment defective and insufficient, and leaves the deed lacking in proper proof of its execution. We do not think such statement must necessarily be in the identical language of the statute, but it must be so clear and unequivocal that it can be readily seen from the clerk's certificate that the officer certifying to the acknowledgment had power or authority under the laws of his state to act.

Appellant's counsel urgently insists that the phrase found in the clerk's certificate, viz.: "that full effect and credit ought to be given to his (justice of the peace) official acts," is tantamount to a statement that the justice of the peace had authority by the laws of Indiana to take and certify the acknowledgment. Appellant does not favor us with any citation from any text book or decision in support of his contention. The statement of the clerk that the official acts of the justice of the peace are entitled to full faith and credit conveys no information as to whether or not the justices had authority under the laws of Indiana to take and certify acknowledgments. This information is just what the legislature required should appear in the clerk's certificate to establish due execution of the deed and entitle it to admission in evidence without further proof of its execution. A justice of the peace in Indiana probably has power and authority to perform many and divers official acts, among which

may or may not be that of taking and certifying acknowledgments to written instruments. The information required to appear in the clerk's certificate is not whether or not faith and credit should be given to the official acts of the justice of the peace, but rather, did he have authority under the laws of the state of Indiana to take and certify an acknowledgment to a deed. This power is necessary to the validity of an acknowledgment to a deed, taken in a sister state, when the deed purports to convey land in Colorado, and if this power is not clearly shown by the clerk's certificate, the acknowledgment is defective and leaves the deed wanting in proof of its execution. It cannot be contended that the court will presume a justice of the peace in a sister state or territory has authority to take acknowledgments to written instruments. The legislature certainly did not indulge in any such presumption, for it required a certificate of an officer of a court of record to impart the information required under the seal of the court. The clerk's certificate was fatally defective, and insufficient to show a proper acknowledgment of the deed, therefore the trial court ruled correctly in excluding it from evidence. The following cited cases are somewhat in point upon the question under consideration: *Buckmaster v. Job*, 15 Ill., 328; *Tully v. Davis*, 30 Ill., 103, 83 Am. Dec., 179.

The record showing the judgment to be right, the same will be affirmed.

Judgment Affirmed.

[No. 3727.]

ESTATE OF BROWN V. STAIR.

1. EXECUTORS AND ADMINISTRATORS—*Exhibition of Claims.* Under Rev. Stat., sec. 7212, formal pleadings are not required in presenting a claim against a decedent's estate.

A claim was presented in the following words:

"Estate of C. C. Brown, deceased, to Gobin Stair, Dr., April 1, '08.
That C. C. Brown held in trust and converted the sum of two thousand
dollars belonging to Gobin Stair \$2,000
Credit—Paid on above account..... 500

Balance\$1,500"

Held sufficient. But the court note that it appeared beyond controversy that the administratrix had long known of the claim, and, in a general way, of the facts upon which it was based, and could not have been misled by the manner in which it was presented.

2. — *Exhibition of Claim to Administrator*, is not required under Rev. Stat., secs. 7210, 7211, to avoid the bar of the statute of limitations. It is sufficient if the claim is filed within one year from the granting of letters.

3. COUNTY COURT—*Jurisdiction*. The county court has jurisdiction to allow against an intestate's estate a claim as for money had and received founded upon a purchase of land by the intestate, in his own name, with funds of the claimant.

4. DISTRICT COURT—*Appeal from County Court—Jurisdiction*. Where a cause of which the district court would have had original jurisdiction is brought to it by appeal from the county court, and the parties proceed to trial without objection predicated upon the absence of jurisdiction in the county court, all defects in the jurisdiction of the county court are waived.

5. ABATEMENT—*Prior Action Pending*, must be pleaded; or, where there are no formal pleadings, must be raised by proper objection at the trial or it will be considered as waived.

6. ASSUMPSIT—*Money Had and Received—Waiving Tort*. Brown and Stair were employed as attorneys for a client who had removed to another state. Brown having obtained from Stair authority to settle the fees of the two visited the client at her new place of residence, and, though the fee was payable in cash, took from her a conveyance to himself of lands valued at \$4,000.00, giving the client his receipt for \$3,500.00 in full of his fees, and the like receipt of Stair for \$500.00. In fact, Brown had been employed at the instance of Stair, and with the agreement that the fee should be equally divided. *Held* that Stair was entitled to sue in equity for the undivided one-half of the lands, or, waiving the tort, to sue for the value of one-half of the land; and that Brown, having departed this life, Stair might assert against his estate a claim of the same character.

7. EVIDENCE—*Character of Evidence Required to Establish a Resulting Trust in Land.* In the same case it was contended that the evidence to sustain plaintiff's claim to a moiety of the fee should be of the same character as required to establish a resulting trust in land, i. e., clear, certain, satisfactory, and, according to some authorities, conclusive. The court, not conceding this proposition, were of the opinion that, even admitting it to be sound, the plaintiff's claim was sufficiently established by the testimony of the client as to the conversations had at the time of Brown's employment. The client, it was said, was not a stranger to the transaction, but a party, and materially interested, and her testimony was not mere hearsay, or declarations of a party made to a stranger, or a mere chance conversation, such as condemned by the authorities. Being credited by the jury, it was sufficient to convincingly establish a definite agreement as to the division of the fee.

Appeal from Denver District Court. HON. CARLTON M. BLISS, Judge.

Mr. WILLIAM YOUNG and Mr. JOHN F. TOURTELLOTTE for appellant.

Mr. GEORGE K. ANDRUS for appellee.

KING, J., delivered the opinion of the court.

Charles Courtland Brown, an attorney-at-law, died in the city and county of Denver, October 25, 1908. Letters testamentary issued November 4, 1908; December 7th was fixed as claim adjustment day, and notice duly published. October 29, 1909, Gobin Stair filed in the county court the following claim:

"Estate of C. C. Brown, deceased,

"To Gobin Stair, Dr.

"April, '08. That C. C. Brown held in trust and converted the sum of Two Thousand Dollars belonging to Gobin Stair.....\$2,000

"Credit—Paid on above account..... 500

"Balance\$1,500"

December 3rd notice of the filing of said claim was served on the executrix. Trial was had December 17,

1909, and judgment rendered disallowing the claim for reasons which do not appear of record. An appeal to the district court was taken, and, upon trial *de novo* in that court, a judgment in the sum of \$1,411.86 in favor of the plaintiff was rendered upon verdict of a jury, from which judgment an appeal was taken to the supreme court.

In the district court, immediately after the opening statement made to the jury by claimant's counsel, which statement, by request of opposing counsel, was taken down by the reporter, motion was made to dismiss the proceeding for the reasons, (1) no such account has been filed as required by law. (2) No notice of the filing of such claim was served on the executrix within one year after the issuance of letters testamentary. (3) There is a fatal variance between the claim as filed and the opening statement of counsel for claimant. This motion was overruled. The same objections were interposed to the introduction of evidence, and overruled.

Such further statements of the proceedings as are deemed necessary will be made in connection with the opinion on the errors assigned.

1. Appellant contends that the claim as filed does not comply with the provisions of law relative to the manner of exhibiting claims against estates. Upon its face, the claim as filed appears to be upon an account of one transaction only, consisting of a single debit of \$2,000 for money received by Brown for the use of the claimant and converted to Brown's own use, and a single credit of \$500 paid thereon. Although inartistically drawn, it sufficiently states the demand under the statute making formal pleadings unnecessary in such probate matters. —Section 8002, Mills' (1912), R. S., 1908, section 7212. It appears beyond controversy that the executrix knew of the claim. As the facts generally upon which it was based were, and for a long time prior to its filing had

been, known to her, she could in no manner have been prejudiced by the form in which it was presented.

2. Appellant also contends that because no notice of intention to exhibit said claim was served by the claimant on the executrix until after the expiration of one year from the granting of letters testamentary, the claim was barred by the statute of limitations, in support of which counsel cited *Alvater v. First National Bank*, 45 Colo., 528, 103 Pac., 378. That case is not controlling, inasmuch as it was based upon statutory provisions different from those which obtain and govern the proceedings in the present case. That opinion expressly states that the claim was barred by reason of the provisions of the fourth subdivision of section 4780, Mills' Ann. Stats., which is as follows:

"Fourth. All other debts and demands of whatsoever kind, without regard to quality or dignity, which shall be *exhibited* within one year from the granting of letters as aforesaid, shall compose the fourth class; provided * * * all demands not exhibited within one year as aforesaid shall be forever barred, unless such creditor shall find other estate of the deceased not inventoried or accounted for by the executor or administrator," etc.

While it is not clear why that statute was held to be applicable in that case, it was probably so held because the administration of the estate was in process of settlement prior to the taking effect of the act of 1903, while the latter act was in full force and effect at the time of the issuance of letters testamentary in the instant case. By that act, section 4780, Mills' Annotated Statutes, was repealed, and the following substituted for subdivision fourth quoted in the opinion, to wit:

"Fourth. All other debts and demands of whatsoever kind, without regard to quality or dignity, which shall be *filed* in the county court within one year from

the granting of letters as aforesaid, and thereafter allowed by the court, shall compose the fourth class, provided * * * all demands not filed within one year as aforesaid, and afterwards allowed shall be forever barred," etc.

Under the former act it was held that a claim was not *exhibited* until notice given as provided in section 4784. That rule does not apply to the new section in which filing only is necessary within the year to arrest the running of the statute.

3. Appellant's counsel urge that the court erred both in denying appellant's motion to dismiss the action upon the opening statement of plaintiff's counsel and the motion to grant a non-suit at the close of his testimony, because, it is said, the opening statement, which, together with the claim filed, constitute the pleadings in the case in the district court, as well as the evidence introduced in support of the claim constituted a departure and variance from the cause of action stated in the claim itself; and for the further reason that the cause of action stated by counsel and established by his evidence, if any cause of action was proven, was to declare and enforce a resulting trust, which the probate court had not jurisdiction to try or determine, and for that reason jurisdiction to try the issues was not vested in the district court by the appeal. This contention was earnestly urged upon the oral argument, and *Cree v. Lewis*, 49 Colo., 186, 112 Pac., 326, and *Marshall, Admx., v. Marshall*, 11 Colo. App., 505, 53 Pac., 617, relied on, in addition to many other authorities cited in the printed brief.

There was nothing in the opening statement made by counsel which necessarily constituted a departure or variance from the cause of action exhibited by the claim on file, and nothing whatever in said statement, nor in the evidence offered in support of the claim, showing a cause of action of which the county court could not take

cognizance, nor issues which it might not try and decide. If such cause of action upon a resulting trust had been disclosed by the evidence, we think appellant waived the question of jurisdiction of the district court to try it by failing to make the proper objections until after the cause had been tried upon its merits. The district court has original jurisdiction of the subject matter of trusts and partnerships, and to try all the issues that are alleged by counsel for appellant to be involved. By the appeal it acquired jurisdiction of the persons, and by entering upon the trial without objection predicated upon the jurisdiction of the probate court to try the issues, that objection should be regarded as waived.—*Tucker v. Tucker*, 21 Colo. App., 94, 121 Pac., 125; *Fairbanks, Morse & Co. v. Maclead*, 8 Colo. App., 190, 194, 45 Pac., 282; *Marshall, Admx., v. Marshall*, 11 Colo. App., 505, 509, 53 Pac., 617. But, without regard to waiver, appellant's contention is untenable, unless the court first adopts her theory that the cause of action was upon and for the enforcement of a trust resulting from the fact that Brown took in his own name the title to real estate which was paid for in part by the funds of the claimant; that he elected to proceed upon that cause of action; that the county court had not jurisdiction to try that issue; therefore, the district court acquired none; and that as an action for money had and received, or as for money received in trust and unlawfully converted, it cannot be sustained. The claimant did not accept that theory, and the court rejects it.

Plaintiff claimed, and his evidence tended to show, that his father and he were attorneys for Mrs. Julia Smart in a suit pending against her in the district court of the City and County of Denver; that claimant's father, being about to die, advised his son to secure the services of said Courtland C. Brown, an experienced attorney, to assist in the case; that after his father's death, the claim-

ant advised his client to secure the services of said Brown as associate counsel, which she did; that an express agreement was then made or definite understanding had between Stair and Brown, of which Mrs. Smart had personal knowledge, that such fees as the attorneys might collect would be equally divided between Stair and Brown, and as to the amount, the said Brown authorized the fixing thereof by Stair, and so stated to Mrs. Smart; that Stair and Brown were associated as counsel during the pendency of the proceedings, and until the conclusion thereof in favor of their client; that immediately upon the conclusion of the suit, Brown advised the client and her husband to depart from the state and remain away; that before departing, and at divers times thereafter, she asked Brown for settlement, but was put off on various pretexts, and after she had gone to California, some time during the year 1907, was told that Brown would go to California in February, 1908, and then make the settlement. In the spring of 1908, Brown went to California, and there met the client and demanded of her a fee of \$3,000 in cash, or, in lieu of cash, a deed for certain real estate in the city of Denver, which the client valued at \$4,000 or more. Mrs. Smart protested against the charge as exorbitant and unconscionable, and contrary to her agreement with the Stairs, and asserted her right to settle the same with Stair according to the original agreement. Negotiations for settlement continued, during which Brown, insisting upon payment or a deed in accordance with his terms, threatened to return to Colorado and "tie up" all the plaintiff's property and income to secure the payment of his fee, and produced a power of attorney from Stair, authorizing him to settle with the client for all services jointly performed by Stair and Brown. Armed with this power of attorney, and under threats of legal proceedings, Brown induced Mrs. Smart to execute a deed conveying to him the real estate, under

an agreement that the conveyance should satisfy the fees of both Brown and Stair, and that Brown would settle with Stair. After receiving the deed, he tendered to Mrs. Smart a receipt of \$3,500 signed by him individually in satisfaction of his fees, and one of \$500 signed by him as attorney in fact for Stair in satisfaction of Stair's fees. Mrs. Smart protested against such division of the fees, declaring that the agreement had been for an equal division between the attorneys, that she had delivered the deed with the understanding that the fees were to be so divided, and demanded a return of the deed, which was refused, with the statement that \$500 was all that Stair had earned. Pending the negotiations in California, Brown wrote to Stair, without advising him of the amount of fees he was undertaking to collect, stating that he had insisted upon \$500 to be paid to Stair, and secured his permission to settle for that amount, either for Stair alone or to be divided between the two. Upon receiving the receipts given by Brown as aforesaid, and his refusal to return the deed, Mrs. Smart notified Stair of the amount of fees demanded and the deed given, whereupon Stair tendered a return of Brown's check for \$500 and demanded a conveyance to him of one-half the real estate, or payment of one-half its value, as his share of the fees as agreed upon. Brown refused, and Stair commenced suit against Brown in the district court, the nature of which is not disclosed by the record, except by the indefinite statements of counsel for either side. While that suit was pending, Brown died, the suit was abandoned, and claimant elected to file his claim as a general creditor against the estate as for money had and received by Brown and wrongfully withheld or converted. Appellant urges in this court that the former suit is still pending, and therefore is a bar against this proceeding. That question was not raised in the trial court. Former suit pending is a matter of defense, which must be pleaded,

or, where there are no formal pleadings, must be raised by proper objections at the trial, or will be considered as waived.

Under the facts which claimant's evidence tended to prove, he had a right to sue in equity for an undivided one-half interest in the real estate, title to which Brown had wrongfully taken in his own name, or wrongfully retained after demand for conveyance; or, waiving the tortious act of Brown, sue for the value of one-half of said real estate, or the amount of claimant's fees which Brown had received and withheld. At common law, the action might have been in assumpsit, or in debt as for money had and received, upon the theory of a *quasi* or constructive contract. It was proven beyond any question, and we think is not disputed, that Brown was authorized to collect from Mrs. Smart the attorney's fees which were due to Mr. Stair, whatever that amount might be, and which were payable in cash; that without Stair's knowledge or consent, he accepted in payment of said fees a parcel of real estate, giving a receipt in Stair's name as for a fixed amount in cash, which he assumed to be the share to which Stair was entitled, thereby discharging the client from any liability for services performed by Stair. It is well settled that where the liability of the person from whom money was due has been discharged by payment to one claimant who does not assert any hostile claim to the whole amount, another claimant who is entitled to a share in the money may maintain an action for money had and received against the claimant so paid.—27 Cyc., 859; *Webb v. Morris*, 64 Hun (N. Y.), 11, 18 N. Y. Suppl., 711. Upon these authorities, and for the reasons given, the claimant herein had the right to proceed against the estate as for money had and received, and the privity between the claimant herein and Brown sufficient to support an action for money had and received results from the fact that Brown had retained

property of the claimant which he had in conscience no right to keep. In such cases, the law implies a promise that he will pay it over.—27 Cyc., 857, and cases cited under notes 41, 42 and 44; *Mumford v. Wright*, 12 Colo. App., 214, 55 Pac., 744; *Zang v. Bernheim*, 7 Colo. App., 528, 44 Pac., 380. An action for money had and received has often been sustained upon the principle of *quasi* contract, which bears the same relation or analogy to a contract proper that a constructive trust bears to an express trust. The *quasi* contract is a constructive contract, as distinguished from either implied or express contracts, and is defined rather as a relation than as a contract—a fiction of law adapted to enforce legal duties by actions of contract where no proper contract exists, express or implied.—Keener, Cases on Contracts, vol. 1, p. 92; *McCarthy v. Boston & L. R. R.*, 148 Mass., 550, 552, 20 N. E., 182, 2 L. R. A., 608; 3 Blackstone Comm., 159, 166. In this class of relations, commonly designated as contracts in order to adapt the case to a remedy, intention is disregarded; the duty defines the contract.—Maine, Ancient Law, 1; Keener, Quasi-Contracts, 5. A constructive trust arises purely by construction of equity, and is entirely independent of any intention of the parties to create a trust, and often directly contrary to such intention. It is frequently called a trust *ex maleficio* or *ex delicto*. It is entirely *in invitum*, forced on the conscience of the trustee to prevent fraud, or to work justice.—39 Cyc., pages 26 and 27; Washburn, Real Property, sec. 1430; *Walker v. Bruce*, 44 Colo., 109, 117, 97 Pac., 250.

From the close analogy between constructive contracts and constructive trusts may be drawn the reason for the well-settled rule that a person entitled to recover may elect to proceed in equity to declare and enforce the trust, or may waive the tort from which the trust *ex delicto* is raised, and sue in assumpsit for the value of that which has been tortiously taken, or, if not wrongfully

taken, wrongfully and tortiously withheld.—Keener, Quasi Contracts, 159; *Miller et al., Exrs., v. Miller*, 7 Pick. (Mass.), 133, 19 Am. Dec., 264; *Ainslie v. Wilson*, 7 Cow. (N. Y.), 662, 668, 669, 17 Am. Dec., 532; *Connecticut & Pass. Riv. R. R. v. Newell*, 31 Vt., 364; *Standish v. Ross*, 3 Ex. Rep., 527; *Doon v. Ravey*, 49 Vt., 293, 296; *Martin v. McCarthy*, 3 Colo. App., 37, 41, 32 Pac., 551, and cases cited.

In *Ainslie v. Wilson*, *supra*, it is said:

“If an agent receives property for his principal, and there is no presumption that it has been converted into money, the action for money had and received will not lie; but if the agent appointed to collect a money debt should accept from the debtor in extinguishment, property as money, he would not be permitted to question this form of action.” (Assumpsit.)

In the instant case it has been shown that Brown received a conveyance of real estate in satisfaction of a money debt owing from their client to him and the claimant jointly and which was payable in cash, and that he gave his receipt for the same in the sum of \$4,000 as for money paid and received; that so far as Stair was concerned, the said Brown was acting as his agent, whether considered as a partner in this single transaction, or under the power of attorney by virtue of which he professed to act, and, therefore, he ought to have been estopped from questioning, as to form, an action brought by Stair to recover his share of the fee collected, and his executrix should now be so estopped; and further, the amount or value for which the real estate was taken, as shown by Brown's receipts, would be at least *prima facie* evidence of the amount of the joint fee so collected. By his settlement with Mrs. Smart in full for himself and his associate, and by tendering or paying to Stair the sum of \$500, Brown admitted the right of Stair to share in the fees collected to that extent, but denied his right

to recover any greater amount or to have any portion of the real estate conveyed to him, so that the main question in issue upon the trial, and necessary to be determined by the court, was the amount of said fee belonging to the claimant herein. The evidence tended to show that the real estate was actually worth the sum of four thousand dollars, and, due allowance having been made by the jury and court for taxes paid by Brown, the verdict cannot be said to be excessive.

Appellant insists that the evidence was not sufficient to sustain the finding of the jury; that, inasmuch as a resulting trust in realty was involved in one phase of the case at least, the character of the testimony necessary to sustain plaintiff's claim for money value is the same, and governed by the same rigorous rule that is applied in establishing resulting trusts in real estate, namely, that it must be clear, certain, satisfactory, and, according to some authorities, conclusive; that it cannot be established by mere hearsay or circumstantial evidence, or evidence of the declarations of a party to a mere stranger to the transaction. Assuming, but not deciding, that to establish plaintiff's claim for money had and received, the same character and amount of evidence is required as apply to a resulting trust, we think the evidence received is sufficient, and satisfies the rule, granting, of course, that the testimony of Mrs. Smart was given full credit by the jury, as it must have been. There is no reason apparent from the record why it should be discredited. The testimony of Mrs. Smart to statements made by Brown in her presence relative to the amount of the fee, and that it was to be equally divided between Brown and Stair, were not mere hearsay, or declarations of a party to a mere stranger to the transaction or in chance conversation such as is condemned by the supreme court of the United States in *Purcell v. Pullman*, 4 Wall., 515, 519, 18 L. Ed., 459, and *LeRoy et al. v. Newton*, 49 Colo., 490,

113 Pac., 529, and by numerous decisions of the supreme court and court of appeals of this state. The conversation at the time the contract of employment of Brown was entered into was triangular, between Stair, Brown and Mrs. Smart; she was not a stranger to the transaction, but a party to it, materially interested in it, and her questions to Brown and the answers given by him in the presence of Stair were such as, if believed, would convincingly establish a definite agreement and understanding as to the division of the fees. This agreement and understanding, Brown violated, retaining six-sevenths of the fee actually collected, paying to Stair only the remaining one-seventh, and it seems impossible that the jury could have arrived at any other verdict on the evidence, if credited.

The instructions given, fully and fairly state the law of the case. No objection or assignment of error has been overlooked or regarded as abandoned. Finding no prejudicial error, and being satisfied that substantial justice was done, the judgment will be affirmed.

Affirmed.

Decided November 10, A. D. 1913. Rehearing denied December 8, A. D. 1913.

[No. 3730.]

THE GERMAN AMERICAN FIRE INSURANCE CO. v. MESSENGER.

1. FIRE INSURANCE—*Construction of Policy.* A contract of insurance against fire is one of indemnity; it will be given the construction most in accord with the natural and probable intent of the parties.
2. APPEALS—*Law of Case.* The opinion of the supreme court in a former appeal is the law of the case where the evidence upon the second trial sufficiently approaches that given upon the former trial to make the opinion of the supreme court controlling.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. SYLVESTER G. WILLIAMS, for appellant.

Mr. JOHN R. SMITH, Mr. H. B. Woods, for appellees.

BELL, J.

The appellant insurance company insured the appellee against loss by fire under the following provisions in the policy:

“The following described property while located and contained as described herein, and not elsewhere, to-wit:

“1400. on all his stock of merchandise, chiefly agricultural implements, engines and supplies, their equipments and extra parts of all kinds and descriptions, knocked down or set up, and all other merchandise kept by him, including boxes and packings for and containing same, and packing materials, his own or held by him in trust or on commission, or on storage, or for repair, or sold but not delivered, or for which he may be legally liable; * * *

“\$100. on his office and store-room furniture and fixtures of all kinds and descriptions, including advertising materials, circulars, catalogues, cuts, counters, shelving, show-cases, typewriters, safes, carpets, scales, trucks, linoleums, office stationery, and supplies, cash registers, letter files and presses, signs and awnings in and upon building, and on such betterments and improvements to the building as may have been made by the assured (lessee) and recognized by the lessor in the lease as being the property of the assured, all while contained in the two-story and basement composition roofed brick building and additions, adjoining and communicating, situate No. 1710 (Map No. 1712) Fifteenth Street, Denver, Colorado, occupied for mercantile purposes.

“This policy shall cover all merchandise and goods with their spare parts as described, while located in above

described building, vaults, show cases, windows, vestibules, under sidewalks, or upon sidewalks, in yard, on platforms in rear and alley adjoining above described building, and in railroad cars on tracks immediately adjacent thereto."

The pivotal question before us for decision is whether a grain separator, which stood on a vacant lot diagonally across the street from the building mentioned and described in the provisions of the policy above recited, is included in the policy.

The appellee testified at the trial that, August 9th, 1906, he was engaged in the farm implement business, corner of Fifteenth and Wynkoop streets, Denver, and had a grain separator about 10x25 feet standing on a lot which he had used for fourteen years for storing machinery; that his office building was at 1710 Fifteenth Street, 25x60 feet; that he had no yard room whatever immediately adjoining the office building or elsewhere, except diagonally across the street as aforesaid; that the value of the separator was from \$750 to \$800; that an employee or soliciting agent of the appellant company called upon him at his office and solicited the policy in suit, and at that time the assured stood at his office window and pointed to the place where the separator stood and said to him, according to his testimony, which is as follows:

"We will go over and look over these goods, and the gentleman's reply to me was: 'I have been through those lots a dozen times and I know what is on there as well as you do,' and he and I did not go over. We did not go over together, he went away and later on mailed me this policy, and I put the policy in my safe and in due time sent him a check for the money and the matter lay until I had this fire."

He further testified that this conversation took place the day the policy was solicited and written in his office; that the agent who wrote the policy called on him at his

office occasionally, and he thought that he paid him a premium. The regularly appointed agent of the company was Frederick W. Standart, who testified that the policy was a renewed annual policy, and was written from the records in his office, the first having been issued from May 30th, 1904, the second from May 30th, 1905, and the last, or one in suit, from May 30th, 1906, to May 30th, 1907; that he never solicited the risk; that it was a part of the business of the office when he took the agency; that he could not remember what he did or how the policy was written in this specific case, and stated, as his opinion, that the description in the policy would not include the separator.

The testimony shows that a horse corral immediately adjoined the building on the rear, and that assured had no yard room, except where the separator stood. There is no dispute that the assured and the soliciting agent or employee arranged for the insurance. Mr. Frederick W. Standart testified that he knew nothing about the property intended to be covered, except what was disclosed in former policies of which the one here under consideration was a renewal. The printed part of the policy purports to cover all merchandise in yard adjoining the building. The term "adjoining the building" was construed by the supreme court when this case was before it on a former appeal, *Messenger v. German American Insurance Company*, 47 Colo., 449-456, 107 Pac., 643, 646, as follows:

"From the language employed in the policy the most that can be claimed for it, with respect to the yard, is, that it was a yard adjoining the building, but this does not necessarily mean adjoining to or on, but, according to the circumstances, may be intended to denote that to which it refers as being 'near,' 'close by,' 'neighboring,' or 'not far from.' Under such description, the only way to definitely determine the location of the yard mentioned, or

what ground was intended to be embraced under that designation in the policy, is to ascertain from the facts and circumstances surrounding the transaction what ground plaintiff was using outside the building specified, upon which to store his agricultural implements at the time they were listed by the agents of the company and the policy in suit was issued. Following this course enables us to ascertain what ground was meant by the term 'in yard,' and construing the yard mentioned in the policy as the one which plaintiff was using when the company issued its policy, results in giving the contract a construction which is perfectly natural and probable, effectuates the object the parties had in contemplation in making it and does no violence to any language employed in the policy, because it is only by resorting to the circumstances connected with and surrounding the transaction that the intent of the parties with respect to the location of the yard can be determined."

Under the evidence as it now stands, it would seem unconscionable to permit the company to avoid responsibility on this policy after the assured pointed out the yard where the separator stood, and offered to go and show it to the soliciting agent, who refused to be shown, saying that he knew as much about the yard and machinery as the assured did, and afterward the company issued the policy, and collected the premium therefor in pursuance of the arrangement made with the agent. It must be borne in mind that the agents of the companies write these policies, and deliver them to the assured after being informed of the *situs* of the property, and it is the duty of the companies to give explicit descriptions of the property pointed out and intended to be insured, and, if they fail to do so, it would be unjust to permit them to take advantage of their own neglect and escape responsibility. The courts should hold as done that which the parties intended to do.

It is a well established doctrine in this state that a contract of fire insurance is one of indemnity, and, when loss occurs under such a contract, it will be given that construction which is most probable and natural under the circumstances, so as to attain the object the parties had in making it.—*St. L. Co. v. Tierney*, 5 Colo., 582; *C. F. & I. Co. v. Pryor*, 25 Colo., 540, 57 Pac., 51; *Messenger v. G. A. I. Co.*, 47 Colo., 448-453, 107 Pac., 643.

This case was taken to the supreme court on a former appeal from a decision of the district court excluding evidence of alleged circumstances attending the making of the contract, including what was said and done at the time of the execution of the policy, and the supreme court held that such evidence as was tendered should have been admitted, and, assuming that the evidence tendered might be given on a new trial, settled the law on most, if not all, legal points involved in this hearing, and that decision, as far as pertinent, becomes the law of this case.—*Grand Lodge A. O. U. W. v. Taylor*, 131 Pac., 783-784; *First Nat. Bk. of Ouray v. Shank*, 53 Colo., 446, 128 Pac., 50-60.

The evidence actually introduced in the trial court did not altogether conform to that tendered at the former trial, nevertheless, we think it sufficiently approached the evidence tendered as to make the judgment of the supreme court controlling in the trial, and the trial court so held, and we see no reversible error in the record, therefore the judgment is affirmed.

[No. 3755.]

PLANK V. MAXWELL ET AL.

DECEIT—Unqualified Statement as to Which Party Making It Has No Knowledge. A positive statement of matter of fact, susceptible of knowledge, implies an affirmation of knowledge on the part of the one making the statement. If he has no knowledge as to the matter, he is guilty of actual fraud.

Appeal from Mesa District Court. HON. SPRIGG SHACKLEFORD, Judge.

Mr. J. W. ROZZELLE, for appellant.

Messrs. WHEELER & WEISER, for appellees.

CUNNINGHAM, Presiding Judge.

Since the opinion in this case was prepared, our attention has been called to the death of the appellee, Maxwell, and by proper order his widow and children have been substituted. With this preliminary explanation we do not deem it necessary to redraft the opinion.

Plank, the appellant, who was plaintiff below, and who will hereinafter be referred to as plaintiff, sold a forty-acre tract of unimproved land to Maxwell, the appellee, defendant below, receiving \$1,000 in cash and two notes for \$500 each in payment therefor. These notes were secured by a trust deed on the land. Defendant defaulted in the payment of the notes, and plaintiff brought his action in the county court to foreclose the trust deed which defendant had given. Defendant answered, charging plaintiff with having misrepresented the land, the misrepresentations consisting in directing defendant to one tract of land, which plaintiff did not own, and selling an entirely different and vastly inferior tract. There is no attempt made by plaintiff to dispute the deception, but he bottoms his whole defense upon ignorance as to where the land he owned and was selling actually lay. Plaintiff had seen his land but once or twice before he sold it to defendant. It lay several miles from Grand Junction, and in an uncultivated and unimproved section of country. Before defendant went to look at the land, he and one Harris, who was showing the land for the purpose of inducing defendant to buy it, called upon plaintiff, who gave the two men explicit instructions as to the direction and distance they must go in order to

find his (plaintiff's) land. In addition to giving the direction and distance, plaintiff described a post or stake which he said stood at the northeast corner of the land he owned and was offering for sale. He also described certain natural objects near, such as a small butte, stone, etc. With these directions and descriptions received from plaintiff, Harris and the defendant, Maxwell, proceeded to the stake, finding it without trouble.

The land that lay to the southwest of this stake, which they had been told by plaintiff was his, was a very fine tract, level and of splendid red soil. But the stake was not at the northeast corner of plaintiff's land. It was a quarter of a mile distant from that point, and the land actually owned by plaintiff, and which he deeded to Maxwell, was rough, hilly and practically worthless. The evidence offered by defendant to support these statements was ample and practically uncontradicted.

Upon returning from the supposed view of the land, Harris and Maxwell again called upon plaintiff, and told him they had found the stake, describing it and its surroundings with considerable minuteness. Again plaintiff stated to them that the stake was at the northeast corner of his land. Relying upon these statements, defendant bought the land as hereinabove stated. In his answer defendant counterclaimed for the \$1,000 he had paid, with interest, expenses paid by him for a survey, and perhaps other items. Both in the county and later in the district court to which the case was appealed, judgment went in favor of the defendant.

That plaintiff falsely described the location of his land cannot be questioned; indeed, he admits it. If plaintiff had known that his statements concerning the location of the stake were false, at the time he made them, there could be no possible doubt as to the correctness of the judgment, since it was shown that defendant was a man of no experience in the matter of locating lands, and

had no knowledge whatever as to section corners in the vicinity of the land. But the authorities are ample in support of the proposition that it is not necessary that a vendor should have absolute or actual knowledge of the falsity of his statements under circumstances such as we have narrated.

“If a person makes a positive and unqualified false statement of a fact which is susceptible of knowledge, an affirmation of knowledge is implied from the positive character of the statement, and if he has no knowledge, he is guilty of actual fraud.”—14 Enc. Law (2nd Ed.), 99.

Other authorities sustaining this rule are: *Lahay v. Bank*, 15 Colo., 339, 25 Pac., 704, 22 Am. St. Rep., 407; *Sellar v. Clelland*, 2 Colo., 532; *Gooddale v. Middaugh*, 8 Colo. App., 223, 46 Pac., 11; *Stimson v. Helps*, 9 Colo., 33, 10 Pac., 290; *Ballard v. Lyons*, 114 Minn., 264, 131 N. W., 320, 38 L. R. A. (N. S.), 301; *Vincent v. Corbett*, 94 Miss., 46, 47 South., 641, 21 L. R. A. (N. S.), 86; 20 Cyc., 33.

Under the foregoing authorities plaintiff having stated unqualifiedly and as of his own knowledge where the land which he owned lay, he cannot now be heard to say that he had no such knowledge, or that defendant was so negligent in accepting his statement as to bar his right of recovery.

It is urged on behalf of plaintiff in the opening brief (no reply brief has been filed by him) that there was never a meeting of the minds of Plank and Maxwell because of the misdescription of the land. It is not entirely clear how this contention (which we are disposed to believe sound) can avail plaintiff in his attempt to collect the balance of the purchase price of the land. Two courts have found, properly as we think, for the defendant, the appellee here.

Judgment Affirmed.

[No. 3752.]

DAVIS V. RIDDLE.

LANDLORD AND TENANT—*Lease Construed—Cloud Upon Title.* A lease of lands, and the water rights appurtenant thereto, for a term of forty years, assumed to authorize the lessee, at his option, to prospect the land for oil and gas, to construct and maintain machinery, pipe lines, railroads and buildings, to sub-let any part or all of the premises, and to transfer all rights acquired thereunder. No consideration was paid for the lease, and the lessee was not under duty to do anything whatever in the way of development or improvement. *Held* that the paper must be construed as a mere option, and the lessee, having done nothing whatever towards the exploration or development of the land during the whole period of almost eighteen months from the date of the lease to the day of trial, and no evidence being given of any intention on his part to at any time do anything, the lease was held a cloud upon the owner's title and canceled.

Appeal from Boulder District Court. HON. HARRY P. GAMBLE, Judge.

Messrs. WARD & MONTGOMERY, for appellant.

Mr. J. T. Atwood, for appellee.

CUNNINGHAM, Presiding Judge.

On August 13, 1909, appellee filed his complaint in the district court to quiet title to certain lands and water rights in Boulder County; the bill contained the usual allegations in proceedings of this sort where brought under the code. No question is made as to the ownership or possession of the property, the title to which plaintiff seeks to have quieted; both are in plaintiff. But the defendant below, appellant here, claimed an interest in the land and water rights by virtue of a certain purported oil and gas lease. Judgment was rendered in favor of plaintiff, from which judgment the defendant, Davis, brings this appeal.

1. The purported lease upon which appellant bases his claim of interest in the land, and to cancel which

appellee brought his action, was made by one Jackson, appellee's immediate grantor, and runs to appellant Davis. The lease imposed upon Davis, the lessee therein named, appellant here, no duty whatever, save and except the nominal one of paying to the lessor, Jackson, "as royalty to said party of the first part, one per cent of the net proceeds derived from all oil or gas obtained, should Davis see fit to develop the land, and in so doing obtained oil or gas. This lease purports to tie up all the lands and water rights involved in this action for a period of forty years, without obligating the lessee, Davis, to prospect or search for oil, or to do anything whatever, other than to pay the nominal royalty just referred to, should he prospect the land and find oil or gas in paying quantities. Granting that the lease was in all respects a valid one, it is our opinion that the lessee forfeited whatever rights he had under the lease by his failure to diligently prospect for oil and gas, no explanation for his failure so to do being offered. The lease was signed by Jackson, the owner of the land, on February 10, 1909. The complaint in this action was filed August 13, 1909, a little more than six months after the lease was signed. The case was called for trial on July 5th, 1910, almost a year and a half after the signing of the lease by Jackson. No attempt was made on the trial to show that Davis had ever made a move to prospect for oil, or to do anything whatever in that direction, nor did he offer to show to the court, or intimate that he ever intended to do anything. In other words, neither by plea nor proof did he attempt any explanation of his delay in that behalf. This delay, unexplained, was sufficient to work a forfeiture of the lease.—Snyder on Mines (1902), vol. 2, sections 1170, 1180, 1181; *Huggins v. Daley*, 99 Fed., 606, 40 C. C. A., 12, 48 L. R. A., 320; Kindley on Mines (1903), vol. 2, section 862; *Federal Oil Co. v. Western Oil Co.* (C. C.), 112 Fed., 373-375; Costigan on Mining Law (1908), 478.

Our conclusion from these authorities and the facts as stated is that the lease in question, even though originally valid in all respects, had been forfeited by Davis at the time plaintiff filed his action to quiet title, and therefore the decree of the trial court canceling said lease was proper.

2. The lease, as we have pointed out, imposed no positive or certain obligation upon the lessee therein named. It purported to tie up, not only the land, but the water rights incident thereto, for forty years, and purported to give a right during all that time to said lessee (without any corresponding obligation upon him) to prospect the land for oil and gas, construct and maintain machinery, pipe lines, buildings and railroads upon the land, with the right to remove all such improvements; it gave him the further right to sublet any or all of the premises, and to assign and transfer any and all rights by him acquired under the lease. The defendant is not shown to have paid any consideration whatever for the lease, nor is he required by the terms thereof to expend a dollar in money or a day in time in prospecting, searching for, or developing oil or gas wells on the land therein described. Neither did Davis attempt to show on the trial that he had entered upon the work, taken possession of the land, nor that he had any intention of so doing. All that Davis appears to have done under the lease was to place it of record, thereby casting a cloud upon appellee's title. Under these circumstances the lease was voidable at the option of the lessor, or his successor in title, at any time before the lessee, by performance, had supplied the lack of both consideration and mutuality, and made the contract binding and enforceable; and he had the right to withdraw therefrom at any time before performance by the lessee, since the instrument which the parties have termed, and which we, for convenience, have referred to as a lease, is, properly speaking, but a lease option.—

9 Cyc., 327h; *Bewlah Marble Co. v. Mattice*, 22 Colo., 547, 45 Pac., 432; *Gordon v. Darnell*, 5 Colo., 302; *Frue v. Houghton*, 6 Colo., 318, 324; *Stiles v. McClellan*, 6 Colo., 89-90; 9 Cyc., 333.

Judgment Affirmed.

[No. 3778.]

BOVEE ET AL. v. BOYLE.

1. **PLEADINGS—*Construed.*** In an action against the directors of a corporation under Rev. Stat., sec. 911, the complaint averred the recovery by plaintiff of a judgment against the corporation for a sum certain, with costs. Held that plaintiff must be regarded as counting upon the judgment so alleged, and that inasmuch as the judgment was not recovered (until after the institution of the action), and after the directors had complied with the statute by filing the required report, there could be no recovery.

Where the complaint averred that the corporation "duly incurred certain obligations," held that an "obligation" not being synonymous with the word "debt," used in the statute, the plaintiff should have pleaded the nature of these obligations, and that they fell within the class of liabilities contemplated by the statute.

And, where it appeared by the complaint that plaintiff had agreed to subscribe for four thousand shares of the corporation, and to pay therefor \$500.00 in cash, and the residue by a bankable note due in six months, and the agreement further provided that if the corporation should fail in certain undertakings set down in the agreement plaintiff should have the option of returning the stock, and that the corporation should refund to him the full amount which he had paid, but the complaint failed to show that the corporation had not complied with what was required of it by the agreement, or that plaintiff had elected to avail himself of his option, or even that he had complied with his part of the agreement, held there could be no recovery.

2. **CORPORATIONS—*Liability of Directors for the Debts of the Corporations—Statute Construed.*** This statute making the directors of a corporation liable for its debts in case of failure to file the annual report (Rev. Stat., sec. 911) is penal in character and to be strictly construed. The liability of the directors attaches after sixty days from January 1st, and the "preceding year," for the debts contracted during which the di-

rectors become personally liable, dates from the sixtieth day after January 1st, and extends back twelve months from the date of their default.

Not every liability can be made the basis of an action against the directors, *e. g.*, liabilities asserted by reason of a tort of the corporation, or a judgment founded upon such tort.

3. JUDGMENT—*Record as Evidence.* In an action to charge the directors of a corporation with its debts, under Rev. Stat., sec. 911, the mere record of a judgment recovered by plaintiff against the corporation is not admissible in evidence unless accompanied by the judgment roll. That the complaint upon which the judgment was rendered is also offered is not sufficient.

Appeal from Denver District Court. HON. GEORGE W. ALLEN, Judge.

Mr. WILLIAM C. DANKS, Mr. L. F. CRAWFORD, Mr. FELIX B. TAIT, for appellants.

Mr. S. S. ABBOTT, Mr. R. D. REES, for appellee.

CUNNINGHAM, Presiding Judge.

This action was brought by Boyle, the appellee, to whom we shall hereafter refer as plaintiff, against appellants, to whom we shall hereafter refer as defendants, under section 911, R. S.

The first paragraph of the complaint alleges the corporate capacity of the Hydro-Engine Power and Irrigation Company, of which appellants were directors, and the date of its incorporation, to-wit, March 8, 1909. The third paragraph alleges that the defendants were the directors of said company. The fourth paragraph pleads the following from section 911:

“And if any such corporation, joint stock company or association shall fail, refuse or omit to file the annual report aforesaid, and to pay the fee prescribed therefor, within the time above prescribed, all the officers and directors of said corporation shall be jointly and severally and individually liable for all debts of such corporation,

joint stock company or association that shall be contracted during the year next preceding the time when such report should by this section have been made and filed, and until such report shall be made and filed.”

Those portions of the complaint above alluded to were either admitted, or are not vital to this controversy, hence need not receive further consideration. The remaining paragraphs of the complaint, II and V, read as follows:.

Paragraph II. “That said company duly incurred certain obligations during the year 1909 towards the plaintiff herein, and belonging to the plaintiff herein, for which said plaintiff duly recovered judgment on a case tried and decided. Finally, on, to-wit, the 15th day of March, 1910, said plaintiff did recover judgment in the sum of \$1,050.00, together with his costs in that behalf expended, to-wit, in the sum of \$50.00.

Paragraph V. “That said officers and directors did not, in pursuance with said law, file their annual report as required by the law referred to in said statute, and have not filed any such report, whereby, by virtue of the law in such cases made and provided, said officers and directors became and are personally and individually liable, jointly and severally, for the debts of said corporation, and are liable to plaintiff for the said judgment rendered as aforesaid for the debts of such corporation.”

Defendants answered, admitting the judgment and the statute as pleaded by plaintiff, and denying all other allegations, and especially denying paragraphs II and V quoted above. The defendants further in their answer demurred to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action. On the trial appellants admitted their official capacity, and it was further stipulated that the corporation was organized under the laws of the state of Colorado, and had not filed its annual report as required by statute, but

it was stipulated that the same was filed on March 9th, eight days after it should have been filed. Aside from certain formal exhibits not necessary to be considered, plaintiff's proof consisted of an agreement entered into between the corporation and the plaintiff, bearing date May 24, 1909, which we shall later quote in part, the complaint against the corporation on which the judgment pleaded was based, a certain notice served by plaintiff upon the corporation offering to return to the corporation the stock which he had purchased from it, and demanding the return of the money which he had paid, and a note that he had given for stock in the company. (This notice will be referred to later on, and its purpose made apparent.) The decree of the district court against the corporation, being the decree pleaded in the complaint in this case, and a receipt given by the corporation to plaintiff admitting the payment by plaintiff to it of \$500 on the stock purchase were also introduced. No witnesses were introduced by either side, and the defendants offered no proof whatever. At the close of plaintiff's case, defendants moved for a non-suit on the ground:

"1. That the complaint did not set forth, and the evidence support, any original cause of action against the defendants or any one or more of them, as contemplated under section 911, R. S.

"2. That the complaint and the evidence discloses this to be an action based wholly upon a judgment obtained against the company after the removal of the default of the directors. * * *

"3. That the plaintiff has failed to establish any original cause of action against the defendants, or any one or more of them."

This motion was denied and judgment was rendered against defendants, from which this appeal is prosecuted. The agreement introduced in evidence, and hereinabove referred to, discloses that Boyle had subscribed for four

thousand shares of the treasury stock of the corporation, for which he was to pay \$1,000, as follows: \$500 cash, and the balance in a bankable note due in six months. In this agreement the corporation bound itself that it would at once commence the manufacture of an automatic water lift, and complete the machine on or before June 28, 1909. It is then provided in this agreement that:

“In case said party of the first part [the corporation] does not commence the manufacture of said automatic water lift and air compressor at once, and does not complete said machine on or before June 28th, Charles A. Boyle is to have the option of reverting his stock back to the party of the first part, and the party of the first part hereby agrees to refund the entire amount paid by said Charles A. Boyle on such stock to him, when such stock shall have been delivered [apparently meaning re-delivered or delivered back] to party of the first part.”

The notice served by Boyle upon the corporation, and which was introduced in evidence in this case, and of which we have already made mention, recites the agreement between Boyle and the corporation of May 24th, and its terms and conditions; asserts that the agreement has been violated in that the company had not completed the air compressor on or before June 28, 1909; tenders back to the corporation plaintiff's certificate for two thousand shares of stock, and demands the repayment of the \$500 which he had paid to the corporation, and the return of his note for \$500. This notice tenders two thousand shares of stock, whereas the plaintiff appears to have purchased four thousand shares of stock, but as no point is made of this discrepancy, we shall not further notice it. This notice is not dated, nor is there anything to indicate when the same was served.

1. We shall first consider and determine whether, under the pleadings, the plaintiff counted on his judgment against the corporation, as it is held in *Tabor v. Com-*

mercial National Bank, 62 Fed., 383, 10 C. C. A., 429, he might have done, or whether he counted on the original obligation. Counsel for plaintiff repeatedly on the trial below vigorously insisted (as indeed he was obliged to do in order to maintain his cause, since the judgment pleaded was not rendered until after the annual report had been filed and the default of the defendants removed) that he was not suing on the judgment. At one point during the course of the trial he used this language:

“I am not suing on the judgment. I am suing on the obligation against the officers and directors. I only state that it ripened into a judgment and became a judgment, for the purpose of showing this situation. * * * And the decree [meaning the decree against the corporation] is simply evidence of the amount of the indebtedness and the judgment. All I have to show here is when the obligation was contracted.”

We, however, are unable to perceive, under the pleadings, any escape from defendants' contention that the plaintiff did, in fact, notwithstanding the protest of his counsel to the contrary, count upon the judgment against the corporation. And in support of our conclusion, we call attention to paragraphs II and V of the complaint, hereinabove set forth. If the plaintiff counted on the judgment as the debt for which he was suing, then the judgment in this case must be reversed, since the judgment against the corporation, pleaded and introduced on this trial, was rendered, as we have said, some five or six days after the defendants had complied with the statute by filing their annual report.

2. If the defendant counted, as counsel states he did, upon the original obligation, then his complaint was fatally defective for reasons which we shall now proceed to point out. At the threshold of this branch of the discussion it must be borne in mind that a liability of the sort here sued upon is penal, and therefore strictly con-

strued. Both the supreme court and court of appeals of this state have often so ruled, and we know of no well-adjudicated case to the contrary. In the case of *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App., 515, 41 Pac., 834, wherein the statute now before us was under consideration, it is said:

“But there is another light in which the question may be considered. The statute just invoked is penal in its character. The debt was incurred by the Rolling Mill Company, and not by the defendants. The amount was recoverable from them as a penalty, and not as an indebtedness. They are, therefore, entitled to a strict construction of the statute. There are no equities in the plaintiff's favor as against them. It is entitled to what the letter of the law gives it, and no more.”

See also *Hazleton v. Porter*, 17 Colo. App., 1-6, 67 Pac., 170.

In *Afenger v. Anzeiger Pub. Co.*, 9 Colo., 377, 12 Pac., 400, it is said:

“The contract of indebtedness, the default of the corporation, and the directorship of the defendants should all be averred, and as of such date as to show the liability of the defendants under the statute.”

A casual examination of those portions of the complaint filed in this case which we have quoted shows clearly that it fails to comply with the requirements of a good complaint in a cause of this kind, under the authorities just cited, since it fails to state when the obligation upon which the complaint is based was incurred. It has been expressly ruled in this state that the liability of directors of a corporation for failure to comply with the statute in the matter of filing annual reports, attaches after sixty days from January 1st, and that according to the plain letter of the statute, “the preceding year,” for the debts contracted during which the directors become personally liable, dates from the six-

tieth day after January 1st, and extends back twelve months from the date on which the default attaches.—*Bradford v. Gulley*, 10 Colo. App., 146, 50 Pac., 314.

The plaintiff in this case contented himself with alleging that the obligation incurred by the corporation, upon which he seeks to recover in this case, was incurred during the year 1909, hence if it were incurred during either January or February of that year, there would be no liability on the part of the defendants.

3. There is another respect in which the complaint, in our judgment, is insufficient. It is not alleged therein that plaintiff's action was based upon a debt (unless he counted upon the judgment against the corporation, which he expressly disavows), the language of the complaint being, "that the company duly incurred certain *obligations*." No description whatever appears in the complaint as to the nature or character of the alleged obligation. Our statute, it will be observed, makes the directors liable for failure to file the annual report within the proper time, "for all *debts* of such corporation * * * that shall be contracted during the year next preceding," etc. The word "obligation" and the word "debt" are by no means synonymous terms. Many definitions of the word "debt" will be found in Vol. 2, Words and Phrases, p. 1868 *et seq.* In *Salene v. City of Neosho*, 127 Mo., 627, 38 S. W., 190, 27 L. R. A., 749, 48 Am. St. Rep., 653, it is said:

"A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, dependent upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed."

In *Lockhart v. Van Alstyne*, 31 Mich., 76, 18 Am. Rep., 156, this language is used:

" 'Debts,' as used in Comp. Laws 1857, sec. 1821,

declaring that on the neglect or refusal of the directors of a manufacturing company to comply with certain provisions of law regarding the filing of their articles of association, or filing annual report, the directors shall be jointly and severally liable for all debts of the corporation contracted during the period of such neglect or refusal. Held, that the word 'debts,' as used in the statute, means 'present debts,' and liabilities which may give cause of action against the company and result in judgment against it are not embraced in the provision."—*In re Putnam et al.*, 193 Fed., 464; *Weber v. Draper*, 170 Mich., 550, 136 N. W., 596.

From these authorities, and under the strict rule of construction applicable to cases of this sort, we think it is not enough for a complaint to allege that the corporation incurred "certain obligations," but it must go further, and plead the nature of these obligations, for the purpose of showing affirmatively that they fall within that class of debts which the statute was designated to cover. Liabilities sounding in tort, for instance, it is generally held, cannot be made the basis of a suit against directors who have failed to file the annual report; some authorities holding that where such liabilities against the corporation, *i. e.*, liabilities sounding in tort, have ripened into a judgment, the directors are not liable for such judgment.

Moreover, the agreement between the plaintiff and the corporation, out of which the alleged obligation flowed, imposed no certain obligation upon the corporation unless and until the corporation had violated the agreement, and the plaintiff had availed himself of the option in the agreement to tender back the stock which he had received, and demand the repayment to him of the money which he had paid, and the return of the note which he had given. The complaint in this case throws no light whatever upon when, if at all, this agreement

had ripened into an obligation, even against the corporation, since it nowhere is plead in the complaint that the corporation had failed to comply with any of the obligations imposed upon it by the agreement, or that the plaintiff had elected to avail himself of his option. Indeed, no reference whatever is made to the agreement in the complaint. The agreement provides that the plaintiff should give to the corporation a bankable note, but it is not alleged that he did so; that he should pay \$500 in cash, but it is not alleged in the complaint that he did so. In other words, for aught that appears in the complaint, the alleged obligations which it is asserted the corporation incurred, may well have sprung from a tort.

4. Plaintiff, in his brief, contends that if the complaint be defective, it was aided by the proof. But, turning to the proof, we find it to be quite as fatally defective as the complaint itself. If the plaintiff, as he says, was suing on the original obligation, we see no necessity for him having introduced the decree in the first case. But if the decree was competent, it was inadmissible in evidence in this case, because it was not accompanied by the judgment roll—only the complaint on which it was based was offered in connection with it, and the objection of the defendants to its introduction should have been sustained. In *Terry v. Gibson*, 23 Col. App., 273, 128 Pac., 1127, we held that where a judgment is relied upon as an estoppel, or as an adjudication of certain facts, it must be accompanied by the judgment roll, *i. e.*, “the complaint and summons, and according to the weight of authority, the return of service.” Not even by way of recital in the decree against the corporation is it made to appear either that the corporation had been served with summons, or had voluntarily, or in any other way, appeared. The amended complaint itself, on which the decree against the corporation was based, cannot be taken as proof of the allegations in the complaint upon which this case was

tried. Plaintiff relies upon, and quotes at length from *Tabor v. Commercial National Bank*, 62 Fed., 383, 10 C. C. A., 429, a case from this district, wherein the statute before us was under consideration. A careful reading of the opinion in that case will make clear its inapplicability, for the following reasons: (a) The plaintiff in the Tabor case unequivocally counted on a judgment theretofore obtained against the corporation; (b) to the introduction of the judgment roll in that case the plaintiff in error, defendant below, objected, but assigned no ground for his objection; (c) the assignment of error that the court erred in finding for the defendant in error, plaintiff below, rested upon a futile exception; (d) the court expressly found in that case that there was no question of the time when the debt in question was incurred, because the corporation never filed any reports, and the plaintiff in error became liable for all its debts; (e) it is stated in the opinion that, "the court below rendered judgment against the plaintiff in error for one of the *debts* of the corporation"; (f) the whole case is bottomed upon the conclusion of the court that a judgment had been counted on, and that a judgment is a debt of a corporation."

For the reasons pointed out, we are convinced that the complaint in this case was fatally defective, and that the evidence was wholly insufficient to sustain the judgment, hence the judgment of the trial court will be reversed and the cause remanded, and it is so ordered.

Reversed and Remanded.

[No. 3780.]

ANDERSON, ADMINISTRATOR, V. DAILEY.

1. PLEADINGS—*Guaranty—Complaint.* Action against a mining corporation and one who had acted as manager of its affairs for the wages of

plaintiff, the complaint being in the common counts for work and labor. The evidence showed that, at most, the individual defendant was a mere guarantor that the corporation would pay. *Held* there could be no recovery.

2. STATUTE OF FRAUDS—*Need Not Be Pleading*, where the plaintiff declares in the common counts.

3. CONTRACTS—*Guarantor or Original Contractor*. Action against two as original contractor. The evidence examined and held to show incontestably that one defendant was a mere guarantor.

MORGAN, J., dissenting.

Appeal from Teller District Court. HON. JAMES OWEN, Judge.

Mr. HENRY TROWBRIDGE, Messrs. STOKES & SHERMAN, for appellant.

Mr. CHAUNCEY W. BLACKMER, Mr. THORNTON H. THOMAS, for appellee.

CUNNINGHAM, Presiding Judge.

Dailey, the appellee, filed his suit in the district court against The Friday Mining and Leasing Company, and Phillip Schuch Junior, to recover for services which he alleged that he had performed for the defendants at their special instance and request. The mining company made no appearance. Schuch answered a general denial. Judgment went against the mining company for \$678, and against Schuch for \$535—a verdict having been rendered for these amounts. After judgment was rendered by the lower court Schuch died, and Anderson, his administrator, was substituted as appellant.

There is but a single question presented for our determination, *viz.*, was Dailey employed by Schuch, or was the latter simply a guarantor? If a guarantor, Schuch cannot be held liable under the pleadings, since it is conceded, as indeed it must be, that the complaint was upon the common count, and charges a joint liability

on the part of the defendants, and the trial court instructed that:

“To entitle the plaintiff to recover a verdict at your hands against the defendant, Schuch, he must satisfy you by a preponderance of the evidence that the defendant Schuch employed him and agreed to pay him and not that the defendant Schuch guaranteed the payment of the indebtedness of the Friday Mining and Leasing Company.”

There can be no question but that the services rendered by plaintiff were performed upon mining property belonging to the mining company—a corporation—and operated by it. Schuch was an officer and stockholder of the company, and appears to have had general charge of its mining operations. It is also certain that Schuch frequently, from time to time, urged Dailey to remain at work on the property, and assured him that he (Schuch) would see that he got his money—his wages. These assurances were made orally and by letters, and were couched in language, at times, indicating that he (Schuch) would see that the company paid, and at other times indicating that he (Schuch) would pay from his own funds. Schuch's assurances that the company would be in funds and pay cannot, of course, create any reasonable liability against him.

But two witnesses were called—Dailey and Schuch. Schuch's testimony was unequivocal that he (Schuch), acting as the representative of the mining company, employed Dailey for that company, and that he never employed him personally. While there are certain phrases or sentences in Dailey's testimony which might bear the construction that he was employed by Schuch, to work for him personally, still, when fairly considered, his own testimony establishes quite the contrary. For instance, Dailey testified that Schuch

“Told me the company were doing the best they

could to raise money, but that he would pay me what was owing me himself."

He also testified that:

"\$952.50 is due me from the Friday Mining and Leasing Company."

And again:

"I was working for the Friday Mining and Leasing Company. Schuch said he would guarantee the money."

Plaintiff introduced a letter from Schuch to himself, containing the following:

"After our telephone talk this morning I have decided to write you a statement in full, so that you may assure all the men to whom some money is due (Dailey appears to have been foreman at the mine) from the Friday Mining and Leasing Company, that I will personally see that they get every cent that is due them within a very few days. I have got sufficient subscriptions to make good, and I will have money in the company's treasury, and I shall also request the secretary and treasurer to issue the checks as soon as the money comes in, until all accounts are paid."

And in another letter, which was put in evidence, Schuch writes Dailey as follows:

"You can rest assured, and can assure the men, that I will stick to them and see that they get their money, even if I have to sacrifice my personal property to make up the company's affairs, which have been entrusted to my care."

If Schuch had employed Dailey personally, and personally obligated himself to pay, there could have been no occasion or justification for any assurances from Schuch that he would pay him, "even if he had to sacrifice his personal property to make up the company's affairs." These letters make it clearly apparent that Schuch did not regard himself as obligated in the first instance to Dailey by any contractual relation. That Dailey under-

stood that he was employed by the mining company, and was working for it, and not for Schuch, is equally apparent, not only from what we have already quoted from his testimony, but from the further fact that all payments which he received for his wages were made by company checks, and his time-book, kept by himself, was headed: "Services rendered for the Friday Leasing Company," and all bills were rendered by him to the company. Indeed, not until he filed his complaint did he ever, so far as the record indicates, intimate that he had any legal right to look to, or claim upon, Schuch for his wages. It is possible that there may have been a very short period of time when, under the most favorable construction of the evidence, Schuch may have become personally and directly responsible to Dailey, but if so, the time covered by such change in the relationship, if there was any change, was short, and the amount earned under it small.

As we have said, the sole question is, can Dailey, on a complaint on the common counts, averring that Schuch employed him jointly with the company, to work for him (Schuch) and the company, recover where the proof clearly shows there was no such employment at all, and that at most Schuch was a guarantor only? This question must be answered in the negative, if pleadings are to cut any figure whatever in a case. To rule otherwise would be as flagrant a violation of all rules of pleading as to permit one who has sued in tort to recover on *quantum meruit*, if the proof chanced to show defendant not guilty, but that he owed plaintiff for services performed. Against a complaint charging liability as a guarantor, Schuch may have been able to successfully plead the statute of frauds, though we do not so decide. Counsel for appellee suggest in their brief that defendant did not plead the statute of frauds as a defense, but denied generally. There are two sufficient answers to

this suggestion, *viz.*: 1. Schuch's right to have this judgment reversed in no manner rests upon the statute, but upon a fatal variance between the pleadings and the proof. 2. A defendant is not required to plead the statute,

"Where the plaintiff sues on the common count, and therefore, does not disclose the foundation of his case until he puts in his evidence."—Brown's Statute of Frauds (5th Ed.), sec. 508; *Durant v. Rogers*, 71 Ill., 124-5; *Solomon v. McRae*, 9 Colo. App., 26, 47 Pac., 409.

Much as we dislike to disturb the judgment of a trial court, or reverse judgments for errors pertaining to pleadings, no alternative is left us, since it cannot be said that the substantial rights of the defendant were not prejudiced by the errors to which we have called attention. The trial judge should have sustained the motion for a directed verdict interposed by defendant at the close of plaintiff's testimony.

Judgment Reversed.

MORGAN, J., dissenting:

The majority opinion is based upon the conclusion that the lower court should have sustained Schuch's motion for a directed verdict at the close of the plaintiff's case. It is unnecessary to cite authorities that, where the plaintiff's evidence tends to prove the allegations of his complaint, such motion should be denied. The issue that was tried in this case was upon Schuch's individual liability, as an original promisor, for the payment of the plaintiff's services. The question before this court is, was the evidence sufficient to justify the court in submitting such issue to the jury? The complaint was upon an indebtedness for services performed, *indebitatus assumpsit*. Answer, general denial. The majority opinion concludes that the plaintiff's testimony shows that Schuch's promise was within the statute of frauds. The lower court did not think so, nor did the jury, and this court should not interfere if the evidence tended to prove the

allegations of the complaint, or, if there is a conflict in the entire evidence on which the issue was submitted.—*Union Coal & Coke Co. v. Edman*, 16 Colo., 438, 440, 27 Pac., 1060; also *Colo. Coal & Iron Co. v. John*, 5 Colo. App., 213, 38 Pac., 399.

A reversal is in violation of the code provisions as to substantial rights (sec. 78, Mills Ann. Code) and subversive of a rule established by many decisions of our courts, concerning judgments on conflicting testimony.

Schuch was general manager, stockholder and president of the mining company, and, as such, hired plaintiff as a time-keeper and laborer, in December, 1907, and the plaintiff continued to work for the company up to July 6, 1908. His wages were not paid for June and he took up the matter with Schuch concerning the payment thereof. They had some talk about it over the telephone, and otherwise, and some letters passed between them as to the matter. Plaintiff's version of it is that Schuch agreed to pay his wages individually from and after that time if he would continue to work; Schuch denied it, and this was the issue tried. The court by the instruction quoted in the majority opinion, eliminated any other issue. The following extracts from plaintiff's testimony show the basis of the court's ruling, and the jury's verdict:

"Q. Now, what I am getting at, did you have a conversation on the 6th day of July, 1908, with Mr. Schuch with reference to his paying you from that time on? A. Very close to the 6th, if not the 6th.

"Q. What did he say to you with reference to your continuing working on for him? A. He said he would pay it himself.

"Q. About when was the conversation you had with Mr. Schuch with reference to getting your pay? A. Have had a good many conversations about it.

"Q. What did he say with reference to that letter?

A. I was talking about the money and he said he would pay it.

“Q. You had two conversations with him? A. Yes, sir.

“Q. And in both of these conversations he referred to these two letters? A. Yes, sir. He said he would pay this money himself.”

On cross-examination, in reference to Schuch's first promise:

“Q. For how long a time had he been telling you that? A. Let me see—from the first he owed me. I think that was in June. It was the first time he paid the rest and didn't pay me.

“Q. What did he say about you continuing working there? A. He wanted me to stay right on with him.”

In reference to his time-book containing daily time of himself and the other men:

“Q. Tell the jury what it has at the head? A. 'Labor performed for the Friday Leasing Company.'

“Q. And you never put Phillip Schuch's name in any of these statements? A. I don't think I did. He told me to make out my statements that way.

“Q. From the last of June, 1908, to the present time the Friday Mining & Leasing Company have been owing you something all the time? A. Schuch has been owing me. It has never been squared up.

“Q. And except for what Mr. Schuch wrote in letters to you he didn't say anything more than was said to you on or about the 6th of July, 1908, about paying you? A. Why, about paying me, he has told me time and again he would pay me.

“Q. Now, will you tell this jury exactly what words Mr. Schuch said to you whereby he hired you to work for him? A. He told me to stay with him and he would pay me. That's the words.

“Q. Until you commenced this suit did you ever

make a demand upon him personally to pay this or any part of this time account? A. Yes, sir.

“Q. In what way? By letter or word of mouth?

A. I don't know whether by letter or not.

“Q. And did he not reply that the company was getting in money as best it could from the stockholders?

A. He has told me the company were doing the best they could to raise money but that he would pay me what was owing me himself.

“Q. Now, you went to Denver once, did you not, at Mr. Schuch's expense, and as the guest of the company and were entertained there at the Shirley Hotel? A. I was there at the Shirley with the exception of twelve days.

“Q. Do you recollect when that was? A. I think last 4th. I am pretty certain it was last 4th.

“Q. In 1909? A. Well, I couldn't tell you. Sometime in July last year.

“Q. Did you at that time make claim upon Mr. Schuch personally to pay you the money then owing you? A. At the time that I was there?

“Q. Yes. A. I asked him for it and he said he would pay it.

“Q. Who was present? A. I don't know. I never dunned him for money in the presence of anybody.

“Q. Wasn't the directors there? A. No, sir. There was a gathering at that time and he took me to Mr. Peterson and wanted me to tell them what I knew of the mine.

“Q. Then you say at that time you made a personal request to pay the money he owed you and he said he would? A. Yes, that's all. I think he paid me \$2, but he said, “You need not make any account of it.”

It is true the plaintiff testified that Schuch “guaranteed” the payment of his wages as quoted in the majority opinion, but it was in regard to money earned prior to July 6, 1908, and it was in answer to the follow-

ing question: "I will ask you who you were working for then during the month of June, 1908, and the first six days of July, for Schuch or the Friday Mining and Leasing Company?"

In addition to the quotations from Schuch's letters in the majority opinion I quote the following:

"Now, Mr. Dailey, I want you and Judson to do me one favor and if any of the other boys are willing to, I will gladly do for them on the same basis. * * *

"Now, Mr. Dailey, I want you and Judson to help me hold the Friday Mine until I can get the money together to clean up its debts and proceed with the development work just enough to hold the contract."

Schuch further testified on this issue:

"I wrote the letter of October 22, 1908, and I intended to see those men paid. * * *

"I would say there was then some conversation to the effect that I wanted Mr. Dailey to continue with the mine and stick to me and I would stick to him."

If Schuch would say this, together with his letters quoted in the majority opinion, in writing, does it not indicate the truth of plaintiff's testimony as to what he said, orally? From any viewpoint, was there not enough in the testimony to justify the court in submitting the issue to the jury?

At the close of the evidence Schuch asked for an instruction to the effect that there was no evidence to bind him individually, which the court refused, but gave two instructions requested by him, one quoted in the majority opinion and the other as follows:

"In any event a verdict against the defendant, Philip Schuch, cannot be recovered for more than the amount of unpaid indebtedness which has accrued since the 6th day of July, 1908."

Schuch's request for these instructions, and the giving of them, shows clearly the issue that was tried. No

attempt was made to hold Schuch as a guarantor, and the court took such consideration from the jury and limited the jury's deliberations to one issue alone.

In the late case of *Hall v. Allen*, 46 Colo., 355, 104 Pac., 489, the supreme court held a similar promise not within the statute. Allen was a physician and had been attending Mrs. Hall's brother in a hospital for a short time, and while so attending him, received a letter from Mrs. Hall making inquiry, and on answering it, received the letter copied in the court's opinion, page 356, wherein she said:

"Doctor, may I ask a favor of you, namely, that you let me know every day or two just how he is doing, and even a postal card will be appreciated. And we will gladly pay all expense. * * *

"All of his expenses will be paid later on and we want him to have anything to make him more comfortable, etc."

The court held this was "a request to the doctor to continue to render such services required," and the court said:

"The questions as to whether the doctor relied solely upon this employment, and, if a third person is liable at all, the promisor's undertaking is collateral, are eliminated from our consideration by proper instructions to the jury upon that phase of the case, which found adversely to the contention of the appellant, which findings we think there is sufficient evidence to sustain."

The opinion cites *Boston v. Farr*, 148 Penn., 220, 23 Atl., 901. In that case a physician had attended defendant's stepson for a time and, another physician's assistance being needed in an operation, he stated to defendant that he did not know whether he would be paid or not, and defendant replied:

"If the boy dies I don't want any blame resting on

me. You go and get the doctor and do all you can for the boy. I will see that you get your pay."

The court held this was an original promise. *King v. Edmiston*, 88 Ill., 257, is also cited, wherein the court held the promisor liable for a physician's services from and after an offer and request that he "continue his labors."

If services are performed for, or goods sold to, one person at the request of another, and the credit is given to him, he is liable.—*Geary v. O'Neill*, 73 Ill., 593. Schuch requested the plaintiff to continue working for the mining company, saying he would pay the plaintiff himself if he would continue his work. Plaintiff had refused to credit the company any longer and must have given credit to Schuch thereafter.

That plaintiff put at the top of the page of daily time record for the other men and himself the words, "Labor performed for the Friday Leasing Company," does not show that plaintiff credited the company; furthermore, he testified that Schuch told him to make his statements that way. Plaintiff was looking after everything as superintendent, hired the men, kept the time for all, along with that of his own, and sent the statement for all to Schuch, in Denver. Checks were returned and plaintiff paid men. Plaintiff never kept a separate personal account nor did he present any separate personal statement. The majority opinion says he never demanded payment of Schuch individually prior to the suit, but the foregoing testimony shows the contrary.

Schuch had an individual as well as a representative capacity and his representative capacity did not bar him from acting as an individual. The contested fact was peculiarly a question for the jury. They saw the witnesses on the stand, observed their demeanor, and so did

the court; the jury found the issue for the plaintiff; the court ordered judgment thereupon and denied a new trial; the judgment should stand.

[No. 3735.]

TOWN OF MEEKER V. FAIRFIELD.

1. **EVIDENCE**—*Opinions as to the Ultimate Facts*, which are for the jury only, are inadmissible unless the witness is a qualified expert, or his testimony involves a description, estimate of magnitude, velocity, value, or the like, or from the nature of the subject of inquiry it is impossible or difficult to state in detail the facts and their surroundings with such exactness as to produce in the minds of the jury the impression which personal observation has produced in the mind of the witness. Cases upon the subject examined.

2. **APPEALS**—*What May Be Assigned for Error—Errors Waived*. Plaintiff, who in the trial below allowed many witnesses to give their opinion as to the ultimate facts upon which the jury are to pass, and elicits from his own witnesses their opinions upon the same question, waives the error.

So where, in an action for negligence, the defendant not only admits irrelevant and incompetent evidence as to the conduct of the defendant after the accident, but gives affirmative evidence upon the same subject, he will not be heard to assign error upon the admission of like evidence over his objection.

3. **NEGLIGENCE**—*Conduct of Defendant After the Accident*. A party is not to be charged with negligence on mere proof that after the accident he repaired the alleged defect, or defective condition, to which the injury is attributed. Such conduct should receive the approval and encouragement of the courts.

4. — *Evidence—Prior Accidents*. In an action against a municipal corporation for injuries attributed to the defective condition of a public walk, evidence of prior similar accidents at the same place is admissible to show notice to the corporation of the defective condition of the walk where such notice is in issue.

Appeal from Rio Blanco District Court. HON. JOHN T. SHUMATE, Judge.

MR. JAMES C. GENTRY, for appellant.

MR. EDWARD C. STIMSON, for appellee.

HURLBUT, J., rendered the opinion of the court.

Action begun May 23, 1910, by appellee, as plaintiff, against appellant, seeking to recover a judgment for personal injuries received from falling upon a cross-walk in the town of Meeker. Plaintiff recovered judgment, from which this appeal is prosecuted.

The evidence tends to show that on or about November 15, 1909, plaintiff started to cross Sixth Street on a cross-walk (covered with snow and ice) which had been constructed by the town; that after passing over about one-half of the same she slipped and fell, thereby breaking her leg; that she was confined to her bed some six weeks and suffered considerable pain; and that the injury was of a serious and permanent nature. It is charged in the complaint that defendant constructed said cross-walk unskillfully, negligently and carelessly, and in such manner that the same was dangerous to pedestrians walking thereon; and it is also charged that the cross-walk was constructed of cement or a kind of mortar, laid and finished in an oval form or shape, which, if covered with snow or ice, would likely cause pedestrians to slip and fall thereon. The answer denies liability on the part of plaintiff, and alleges that if plaintiff was injured in using the walk it was by reason of her own negligence and not by reason of any negligence on the part of defendant.

Many witnesses testified at the trial. The most serious claim of error contended for by appellant is that the jury's verdict was based principally upon opinion evidence admitted at the trial over defendant's objections, and its brief appears to be almost entirely directed to

this contention. There are one or two other objections raised by appellant, which we will hereafter notice. It is clearly shown that a number of witnesses for plaintiff were permitted, over objection of defendant, to testify that in their opinion the cross-walk upon which plaintiff sustained her injuries was of faulty construction and dangerous for pedestrians using the same.

Appellee in her brief rather intimates error in the court's ruling, but contends that the admission of such opinion evidence was not prejudicial to defendant's rights, because (as claimed) defendant waived the right to question such rulings by permitting other evidence of the same character to be introduced without objection, and by subsequently introducing evidence itself of the same character. She therefore invokes the rule that "Errors committed in the admission of evidence which is affirmatively shown by the record to be not prejudicial will not warrant reversal of the judgment." She further contends that if incompetent testimony *was* received, over objection, still, if it appears elsewhere in the record that the same facts had been introduced in evidence without objection, appellant cannot complain. This is one of the decisive issues presented. As a sample of the evidence admitted over objection, we extract the following from the record, *viz.*:

From the testimony of George Suttles, plaintiff's witness, on direct examination:

"Q. State whether in your judgment those cross-walks are safe or dangerous cross-walks? (Objection overruled.)

"A. According to the condition of the weather. If they are wet I consider them not safe."

From plaintiff's witness Harley Suttles, direct examination:

"Q. Mr. Suttles, is that a dangerous crossing? (Objection. Overruled.)

“Q. Is that a dangerous sidewalk to pedestrians crossing it?

“A. Yes, sir.”

From plaintiff's witness Joy, direct examination:

“Q. State whether it is dangerous from its manner of construction, dangerous to pedestrians passing over it? (Objection. Overruled.)

“A. I should think it was.”

Other witnesses for plaintiff testified to the same effect, over defendant's objection.

The following questions, however, were propounded to plaintiff's witnesses, on direct examination, and answered, without any objections whatever from defendant, *viz.*:

Witness Mellinger, on direct examination:

“Q. State whether, as a matter of fact, in your judgment, the manner in which those crossings are constructed, that they are dangerous to pedestrians crossing over them, persons walking over them?

“A. In my judgment?

“Q. Yes.

“A. I think they are.

“Q. Why?

“A. On account of the shape of them.

“Q. Just state to the jury all about it and why.

“A. They are too oval.

“Q. Is it from the manner in which they are constructed that they are dangerous?

“A. I think so, at times.”

On cross-examination defendant fully interrogated the witness concerning the above testimony.

Also from direct examination of plaintiff's witness Miller:

“Q. From the manner in which it is constructed is that walk, in your opinion, dangerous to pedestrians crossing over it?

“A. Well, I think it has a little crown, a little bit too much. I think it would be a little bit dangerous there in wet weather, or snow.”

Defendant's witness Lindow testified on direct examination as follows, Mr. Gentry, defendant's attorney, interrogating:

“Q. But generally speaking, from your experience and observation of the construction of similar crossings, this particular cross-walk, state whether it is safe or dangerous, in your opinion.

“A. That is a pretty broad question to answer; for myself I can say it is safe, because I never fell on it.

“Q. Can you say whether or not it is dangerous?

“A. Well, I can't say that it is dangerous.”

Other similar questions were by defendant propounded to, and answered by its own witnesses.

From the foregoing it will be seen that the opinion of witnesses, of both plaintiff and defendant, was elicited without objection, as to whether or not the cross-walk was dangerously constructed, and cross-examination was freely indulged in by both parties as to the experience and qualification of such witnesses, without objection.

As to when and under what circumstances witnesses (expert or non-expert) will be permitted to give their opinion upon ultimate facts which are exclusively within the province of the jury to determine, we have a number of decisions of our own supreme court to guide us.

In *Colo. C. & I. Co. v. Lamb*, 6 Colo. App., 255, 40 Pac., 251, it was held that it was error to permit a witness, over objection, to state whether or not in his opinion the roof of the mine was properly secured at the time the deceased was at work. The court said:

“This was not a case which called for expert testimony on that subject. The answer of the witness, which was naturally adverse to the company, tended to determine the thing which was the very essence of the action,

to-wit, the negligence of the company. This was a question for the jury to determine under all the evidence. It was a matter which, when the facts were before them, they could as well decide as the witnesses themselves, and the case was not brought within the rule which permits the opinions of witnesses to be given to the jury in place of the facts on which those opinions must of necessity be based."

In *D. T. & Ft. W. R. Co. v. Pulaski I. D. Co.*, 19 Colo., 367, 35 Pac., 910, the court said:

"It is insisted by counsel for appellant that the testimony was inadmissible, because the mere opinion of witnesses who were not expert. While the general rule is that the opinion of a witness is inadmissible except when the injury involves a question of skill or science, and the witness possesses a peculiar knowledge of the subject, acquired by study or experience, there are well recognized exceptions to the rule, and among these exceptions are instances which involve a description or estimate of magnitude, size, dimension, velocity, value, etc., and when, from the nature of the subject under investigation, it is difficult or impossible to state with sufficient exactness, or in detail, the facts, with their surroundings, in such a manner as to produce upon the minds of the jury the impression that a personal observation has produced upon the mind of the witness."

Also in point: *Smuggler U. M. Co. v. Broderick*, 25 Colo., 16, 53 Pac., 169, 71 Am. St. Rep., 106; *R. G. W. R. Co. v. Boyd*, 44 Colo., 119, 96 Pac., 781; *Nichols v. C. B. & Q. R. R. Co.*, 44 Colo., 501, 98 Pac., 808; *D. & R. G. Ry. Co. v. Reiter*, 47 Colo., 417, 107 Pac., 1100.

From the foregoing authority it seems to be the established rule that it is reversible error to permit a witness to give his opinion as to the existence or non-existence of ultimate facts, which are to be determined only by the jury, unless such witness is testifying as a

qualified expert, or his testimony involves a description or estimate of magnitude, size, dimension, velocity, value, etc., or when, from the nature of the subject under investigation, it is difficult or impossible to state with sufficient exactness, or in detail, the facts, with their surroundings, in such a manner as to produce upon the minds of the jury the impression that a personal observation has produced upon the mind of the witness. If nothing appeared in this record upon this question but the interrogatories propounded to plaintiff's witnesses concerning their opinion as to the dangerous or faulty construction of the cross-walk, with proper objection thereto by defendant, and the overruling of the same by the court, this judgment would have to be reversed. Such, however, is not the case. As above shown, defendant, throughout the trial, not only permitted, without objection, one witness after another to give his opinion as to the dangerous construction of the cross-walk, but upon direct examination interrogated its own witnesses upon the same subject, and elicited from them their unqualified opinion concerning that fact. Under these conditions defendant must be held to have waived its right to predicate reversible error upon the refusal of the court to exclude the cumulative opinion evidence admitted over its objection.

Our own appellate courts, as well as those of other jurisdictions, have repeatedly passed upon this question, and we find them practically unanimous as supporting our conclusions.

From page 42, volume 9, Encyclopedia of Evidence, we quote:

“Thus the failure to sustain an objection to improper evidence is not prejudicial error where ample evidence to the same effect, establishing the same facts, has been admitted without objection, or, it has been held, where other evidence of the same fact has been introduced unchallenged.”

In *D. & R. G. R. R. Co. v. Morrison*, 3 Colo. App., 194, 32 Pac., 859, a similar question being before the court, it was said:

“The contention was abandoned on argument, because the record disclosed that the objection was not preserved save by an exception to the testimony given by one witness, and the whole subject had been antecedently embraced in what had been offered and received without objection. Counsel very properly conceded that the force of the objection was destroyed, and that no valid error could be predicated on the ruling of the court.”

Moynahan v. Perkins, 36 Colo., 481, 85 Pac., 1132, 10 An. Cas., 1061, involved the same point. The court said:

“But however this may be, its admission in any event would not have constituted prejudicial error, since the plaintiff testified to the value of his services without any objection to his qualification,” etc.

In *Scott S. & T. Co. v. Roberts*, 42 Colo., 280, 43 Pac., 1123, in passing upon a question like the one before us, the supreme court used this language:

“Counsel for plaintiff in error * * * assigns as error the ruling of the court in admitting testimony offered by the defendant as to the construction that should be placed upon the written contract above mentioned.

“Whether the court erred in this particular we do not feel called upon to determine, since the plaintiff is not in a position to avail itself of this objection, having on its own behalf introduced testimony of the same tenor and effect.”

To the same effect: *Bouknight v. Charlotte, etc., R. R. Co.*, 41 S. C., 415, 19 S. E., 915; *B. & O. R. Co. v. State, Use Chambers*, 81 Md., 371, 32 Atl., 201; *Seay et al. v. Fennell et al.*, 15 Tex. Civ. App., 261, 39 S. W., 181; *McCaffery v. St. L. & M. R. Ry. Co.*, 192 Mo., 144, 90

S. W., 816; *Olmstead v. City of Red Cloud*, 86 Neb., 528, 125 N. W., 1101; *Pratt v. Seamans*, 43 Colo., 517, 95 Pac., 929.

In the light of the authorities cited, as applied to the facts before us, we think the error of the trial court in admitting some of the objectionable testimony referred to, over defendant's objection, was not prejudicial. The record shows that there was about as much opinion evidence received without objection as was admitted over objection. The jury listened to opinion evidence of both parties, one affirming, the other denying, the dangerous construction of the cross-walk. They then made a personal examination of the same before rendering their verdict (the evidence showing that the walk was in the same general condition at the time of trial as at the time of accident). Under this aspect of the case it would be difficult to assert and maintain that the opinion evidence which was admitted over objection, although error, was prejudicial to defendant's rights. No fair presumption could be indulged in to that effect. Defendant having elected to pit the force and effect of the opinion evidence introduced by it upon the character of the cross-walk construction, against that of plaintiff, should not be heard, after an adverse finding by the jury, to insist that the error complained of was prejudicial.

Appellant also insists that it is entitled to a reversal because of error of the trial court in admitting, over its objection, other testimony, to the effect that, soon after the accident, sand and gravel were hauled and placed on the cross-walk by appellant, in order to make it more level and presumably safer for pedestrians using it. The record discloses that defendant pursued the same course at the trial, concerning this evidence, as that adopted by it concerning opinion evidence admitted over its objection, that is to say, it permitted other witnesses of plaintiff to testify, without objection, that after the accident

defendant hauled and placed sand on the cross-walk to make it safer for use by pedestrians, and in addition interrogated its own witnesses on their direct examination as to the same fact, and established by them the fact that defendant did place the sand on the cross-walk after the accident. We again say that, had defendant at the trial squarely stood upon its right to have such testimony excluded, and, when offered, had objected and saved its exception to the court's ruling in receiving it, and gone no further, the judgment could not be upheld; but, having pursued the course above shown, it waived its right in that regard. In personal injury cases a party charged with negligence in causing an accident should not be put in the apparent position of admitting negligence on its part upon mere proof that after the accident such party had taken reasonable and commendable steps to repair the thing causing the injury, in order to avoid possibility thereafter of similar accidents. Such action should receive the approval and encouragement of the courts, rather than necessitate the enforcement of a rule which subjects the party to a penalty for so doing. Here, however, defendant permitted such evidence to be introduced without objection, and afterwards, of its own motion, on original examination of its witnesses, interrogated them and brought out the same facts. The authorities heretofore cited are in point also on this question, and seem to uniformly hold that, under such circumstances, if the court erred in admitting such testimony, over objection, it was without prejudice.

The consideration of one more question will dispose of this appeal. Appellant contends that the court committed reversible error in permitting witnesses to testify that, prior to the accident, other persons had slipped and fallen upon this same cross-walk. Appellee claims that such evidence was admitted only for the purpose of showing knowledge of, and notice to, the municipal authorities,

of the character and condition of the cross-walk, and not to establish negligence on the part of defendant. In this case there was an issue before the jury as to whether or not the city had notice and knowledge, prior to the time of the accident, of the dangerous condition and construction of the cross-walk. It was therefore proper for plaintiff to introduce evidence upon this point, and the jury were entitled to consider it for that purpose only. Had defendant feared that the jury might have misunderstood the real purpose for which this evidence was admitted, and believed themselves authorized to consider it as proof of negligence, it would have been entitled to submit a special instruction for the consideration of the court upon that point. This was not done. It seems to be well settled that, if evidence is competent and admissible for one purpose, though it might be considered incompetent for another, it is admissible for the purpose of applying it to the issues of fact which it is competent to sustain.— Encyclopedia of Evidence, volume 3, page 188; Dillon's Municipal Corporations, volume 2, sec. 1025.

The case of *Hotchkiss Mt. M. & R. Co. v. Bruner*, 42 Colo., 305, 94 Pac., 331, was based upon the death of an employe who was killed while descending into the company's mine. Evidence had been admitted, over objection, to show that a previous accident had occurred at the same point shortly before the one causing the employe's death. The court held that the admission of this testimony was not error, and said:

“It is also contended that the court erred in admitting testimony of a previous accident and one which occurred shortly before the one involved. This testimony was admissible for the purpose of showing knowledge on the part of the defendant that the existing conditions were dangerous,” citing cases.

The recent case of *Griffith v. City and County of Denver*, 55 Colo., 37, 132 Pac., 57, was one growing out of

injuries sustained by a pedestrian while walking upon one of the city's sidewalks. Justice Bailey rendered the opinion of the court, and disposed of the issues before the court by clear and forceful reasoning, some of such issues being almost identical with one or more involved in the present case. In that case it was held not to be error for the trial court to exclude from evidence testimony that other persons had slipped and fallen upon the sidewalk prior to the time of the accident. But it appears in the opinion that the question of notice to, and knowledge of, the city, concerning the alleged dangerous condition of the sidewalk for some time prior to the accident was not an issue in the case, and for that reason it was held that such evidence was inadmissible. The court said:

"The defendant, for answer to the complaint, admitted knowledge and notice of the condition and manner of construction of the walk, but alleged that it was a reasonably safe one," etc.

In the instant case, however, this matter was a direct issue, as such notice and knowledge, prior to the accident, on the part of the city, had been pleaded in the complaint and denied in the answer. The court further said, in the Griffith case:

"Bearing in mind that the testimony of former accidents was offered for the purpose of proving negligence, and could not have been properly offered for any other purpose, as that was the sole issue, * * *

"And in *Denver City Tramway Co. v. Cowan*, 51 Colo., 64, 116 Pac., 136, it is said:

"The general rule is, that when a party is sued for damages arising from a particular act of negligence imputed to him, disconnected, though similar, negligence acts, are inadmissible. A different rule applies when the purpose of the evidence is to establish a previous and continuous defective or dangerous condition of a thing,

and knowledge or notice thereof upon the part of the person sought to be charged, or, perhaps, when its purpose is to charge one with notice of another's incompetency, and probably, in a few other instances not necessary to notice here.' "

District of Columbia v. Armes, 107 U. S., 519, 27 L. Ed., 618, 2 S. C. Rep., 840, was an action for personal injuries received from falling on a sidewalk. It was there objected by defendant that the admission of evidence of other people slipping and falling upon the sidewalk at the same place, prior to the time of the accident complained of, was reversible error. The supreme court disposed of the contention adversely to defendant, and held the evidence admissible as tending to show the dangerous character of the place where the injury occurred, and to show notice on the part of the city of that fact.

There are some other minor questions raised, not necessary to consider. The case appears to have been fairly tried. The record in no way intimates prejudice or passion on behalf of the jury, or that the substantial rights of defendant have been invaded.

Judgment Affirmed.

[No. 3781.]

THE R. W. ENGLISH LUMBER COMPANY V. HIREEN.

1. MONEY HAD AND RECEIVED—*Where the Action Lies.* Where the party sought to be charged has actually received, or had the benefit of, money of the other, for which, in equity and good conscience, he ought to account, *e. g.*, where a corporation has actually received and appropriated money borrowed by its agent without authority.

2. APPEALS — *Defective Pleadings — Amendment Presumed.* Where, upon proper application, in apt time, it would be the duty of the trial court to permit an amendment of the complaint to correspond with the proof, the complaint will, in the court of review, be treated as so amended.

Appeal from Otero District Court. HON. J. E. RIZER,
Judge.

Mr. GEORGE C. MANLY, for appellant.

Mr. O. G. HESS, for appellee.

Per Curiam.

This case has previously been before the supreme court, *Hireen v. The R. W. English Lumber Company*, 42 Colo., 216, 104 Pac., 84. The case was carefully considered in the supreme court, and as the facts are there clearly stated, a repetition is not required at our hands. There appears to have been no new evidence offered on the second trial, which resulted in the judgment from which this appeal now before us was taken. The only matter not common to both appeals grows out of the amendment to the complaint which plaintiff, under permission given by the supreme court, made prior to the last trial. Some question was made on the former appeal as to whether the complaint stated a cause of action for money had and received, and while the court did not hold the complaint defective in that respect, it permitted the plaintiff to amend her complaint, if she desired so to do. Pursuant to this permission, presumably, plaintiff did amend her complaint by adding thereto a third cause of action on which she attempted to state a cause of action for money had and received, but which, instead of stating the facts constituting her cause of action in plain and concise language, as required by our code, conclusions of law were stated, and, therefore, the complaint, perhaps, failed to state a good cause of action under the code; nor was it in common-law form a declaration for money had and received. However, conceding this cause of action was not well pleaded, its sufficiency was not attacked by demurrer or by objection to the evidence on the ground that the complaint did not state a cause of

action as for money had and received. The evidence shows beyond controversy that the plaintiff paid to the defendant \$500, taking a promissory note, under an honest but mistaken belief that the note was executed by an agent of the defendant authorized to borrow money for the defendant and give its promise for payment; that the money so paid to the defendant went into its bank account and was checked out in the usual course of business and so appropriated by it. It was further shown that the agent, although manager of the defendant's business, exceeded his authority in borrowing the money and giving defendant's note therefor. Under these circumstances, it would be inequitable and unjust to permit the defendant to enrich itself by retaining the money of the plaintiff, paid to it by plaintiff under a mistake of fact. Such has frequently been held to be the law, and suit for money had and received maintained.—Keener, *Quasi-Contracts*, pages 114-115.

In *Decry v. Hamilton*, 41 Ia., 18, it is said:

“The estate has received the benefit of the amount which was advanced by defendant. It ought, in good conscience, to repay it with legal interest. This is not required because of the contract under which the money was borrowed, which is invalid, but on the ground that the estate has had the benefit of the money received from defendant.”

Our supreme court, when this case was before it, held that to sustain an action for money had and received, it is only necessary to show that the defendant has obtained money which in equity and right it ought to return.—*Hireen v. English Lumber Co.*, *supra*. That announcement is in harmony with the authorities hereinabove cited, and having been announced by our supreme court in the former consideration of this case, may well be said to be the law of the case. The evidence was amply sufficient to support the verdict of the jury upon

a proper plea of a cause of action for money had and received, and it would be an idle waste of time and of money, and wholly without advantage to appellant, to return the case to the trial court for further amendment, substantial justice having been done.—*Colorado Springs v. Allen*, 48 Colo., 4-8, 108 Pac., 990.

It has frequently been ruled that where, upon a proper application interposed in apt time, it would become the duty of the trial court to permit a complaint to be amended to correspond with the proof, it will be the duty of a court of review to treat the complaint as so amended.—*Merritt v. Hummer*, 21 Colo. App., 568, 122 Pac., 816; *Lang v. Crescent Coal Co.*, 44 Wash., 267, 87 Pac., 261.

Judgment Affirmed.

[No. 3806.]

EDWARDS V. McLAUGHLIN ET AL.

APPEALS—*Finding Upon Sufficient Evidence*, will not be disturbed.

Appeal from Otero District Court. HON. C. S. ESSEX,
Judge.

Mr. EARL W. HASKINS, for appellant.

Mr. MARION F. MILLER, Mr. HENRY W. ALLEN, for
appellees.

KING, J., delivered the opinion of the court.

This action was commenced by the appellant herein for the purpose of subjecting certain real estate, record title of which was in defendant John L. McLaughlin, to the lien of a judgment in favor of the plaintiff and against the defendant Emma McLaughlin, upon the allegation that the last named defendant conveyed the said property to her husband, the co-defendant, with intent to hinder,

delay and defraud her creditors. Upon trial to the court, judgment was rendered in favor of the defendants.

The evidence shows that plaintiff obtained judgment against the defendant Emma McLaughlin under section 3021, Rev. Stat. 1908, which makes both husband and wife liable for family expenses, upon an alleged liability for medical services rendered to the family, at a time when defendant herein was the wife of one Brown, who thereafter died. In that suit, defendant made no appearance, but permitted the judgment to go against her by default. About the time the suit was brought she made a homestead entry upon the property in question, and thereafter conveyed the same to her co-defendant, to whom she was at that time married. Plaintiff offered no evidence, except his judgment, execution thereon, and return thereof *nulla bona*, and the transfer from wife to husband. The evidence upon the part of the defendants tends to show that the conveyance was made to the husband for full consideration, which was paid; that at the time she made the transfer, both she and her husband were advised and believed that the claim was not a legitimate one against her, and could not be collected from her property, for reasons not necessary to state here; that her interest in the real estate, acquired by descent from her former husband, was of small value, and was conveyed to her husband for the *bona fide* purpose of liquidating, and which did liquidate, her indebtedness to some of her creditors. The trial judge, before whom the witnesses appeared, decided that the evidence upon the part of the defendants was sufficient to overcome any presumption or suspicion of fraud raised by the conveyance from wife to husband with knowledge of plaintiff's claim. The evidence was sufficient, if credited, to overcome such presumption, and the finding of the trial court in that respect ought not to be disturbed. It would be difficult to find, or even conceive of, a weaker case upon which to predicate an appeal

the success of which is dependent entirely upon the finding by a court of review that the trial judge failed to understand the evidence or the weight thereof, or to correctly apply the same. The law in the case is plain. The judgment is affirmed.

Affirmed.

[No. 3796.]

MUTUAL LIFE INSURANCE COMPANY v. GOOD.

1. **EVIDENCE—Pedigree—Burden of Proof.** Whoever asserts that a particular person is descended from another has the burden of proof.
2. — **Opinions.** The assured in a life policy was born out of wedlock. The sister of his mother testified that a man named was his father. *Held* mere opinion, and not evidence.
3. — **Pedigree—Hearsay as to,** is admissible, but is to be received with caution.
4. — **Evidence Examined.** Action upon an insurance policy upon the life of one Good. The defendant attempted to show that the assured was, in fact, the son of one Rist, who died of pulmonary consumption, contrary to the declarations of the assured in his application. Verdict for the plaintiff. The evidence being examined, the court declined to set aside the verdict.
5. **TRIALS—Objections to Evidence.** Where a writing offered in evidence is objected to, upon grounds which go to the whole of the document, and counsel for the party, in making the offer, is of the opinion that as to some part the paper is admissible, it is his duty to indicate this to the judge presiding, and, if he fail in this duty, he is not at liberty to afterwards assign error upon ruling of the court excluding the whole document.
6. **APPEALS—Theory of the Case Upon the Trial Below.** Appellant is bound by the theory of the case which his counsel advocated below.
A party will not be heard to assign error upon the instructions which he himself prayed in the trial court.

Appeal from Conejos District Court. HON. CHAS C. HOLBROOK, Judge.

Messrs. MACBETH & MAY, for appellant.

Mr. JAMES D. PILCHER, and Mr. JESSE STEPHENSON,
for appellee.

BELL, J.

The record shows that on December 12th, 1907, Harry E. Good, of Alamosa, Colorado, a train dispatcher for the Denver & Rio Grande Railroad Company, presented to an agent of The Mutual Life Insurance Company of New York, appellant herein, an application in writing for a \$2,000 life insurance policy, which was issued to him, and, among many other things, stated in his application that his father died at the age of 33 years from an injury received in a runaway accident, and that there was no suspicion of tuberculosis or consumption as a cause of his death, and further stated in his application that "I am insured in other companies and associations, as follows: None and in no others." The assured died August 23rd, 1909, and the company refused payment of the policy, assigning as its reason the alleged false answers of the assured in his application concerning his family history and other insurance. Action was brought on the policy and resulted in a verdict for the plaintiff, Venita A. Good, widow of the assured, and appellee herein, in the sum of \$2,000 and costs.

Among the defenses set up by the appellant company, it alleged that, at and prior to the time of making application for the policy sued upon, the assured was affected with pulmonary tuberculosis, which fact he failed to make known to it, either in his application or to its medical examiner, and that he subsequently died from the disease. At the trial the appellee testified that the assured died after a five-minute illness from an unknown cause. Doctor Herbert Van Sands, a witness for the appellant, testified that he examined the assured, about 18 months previous to his death, on behalf of the company, for the policy in question, and that the assured was at that time

in good health, and not affected with the disease; that the assured consulted him subsequently, February 12th, 1908, complaining of a tapeworm, and that, when he saw the assured three or four days before his death, he was blue and emaciated. It would seem that the witness issued a certificate on the death of the assured in which he stated the cause of death as pulmonary tuberculosis, but he testified that he could not recollect having issued such a certificate, and, if he did issue it, it was based upon his general information or knowledge of the deceased, and not upon any examination which he made of him, and, without such an examination neither he nor any other physician could determine whether he had tuberculosis. The appellant insists that the assured's father was Joseph Rist, who died of tuberculosis at the age of 24 years, and that the assured misrepresented this fact in his application.

There seems to be no doubt that Joseph Rist was notoriously affected with tuberculosis from the time he was 21 years of age until he died at the age of 24. The evidence shows that he died after a lingering illness of about three years, the last four or five months of which he was confined to his bed, and that his mother also died of the same type of tuberculosis. This evidence is not disputed, and the real question involved in this phase of the case is whether Joseph Rist was the father of the assured: A brief synopsis of the evidence on this point is that one Ellen Burns gave birth to the assured about three years before Joseph Rist died. About the time of the birth of the child, Barbara Mauch, Rist's half-sister, and by vocation a nurse, gave him money and he left Lafayette, Indiana, because Ellen Burns accused him of being the father of her child, and he stayed away three or four months. Lydia M. Gurley, a sister of Ellen Burns, in her deposition testified that Joseph Rist was the father of the assured. However, this was a mere

conclusion of the witness, and was not evidence. Charles Ashby, another son of Ellen Burns, and an alleged half-brother of the assured, between one and two years younger, testified that he never knew Joseph Rist, but that "I knew from my mother that his name (the assured's father) was Joseph Rist." He produced a family bible containing the following entry under the heading "Births": "Harry E. Rist. Born February 8th, 1881," and further testified that the assured was known as Harry E. Rist until he was about six years of age, when his mother married Samuel Good, and thereafter he was known as Harry E. Good. There is no evidence in the abstract showing that Ellen Burns was ever married until about six years after the birth of the assured, and we infer from the evidence before us that the assured was not conceived nor born in wedlock, or that his mother ever sustained a common-law or ceremonial marriage relation with Joseph Rist, hence there was and is no presumption of law that Joseph Rist was the father of the assured, and the burden of proof rested upon the appellant to establish this fact by a preponderance of the evidence.

Under the very nature of things, no one but the mother can positively identify the father of her offspring, and it may be impossible for her to do so. In that part of India where most of the female children are destroyed at birth, and each woman lives with from three to six husbands, it is conceded by both husbands and wives that it is impossible to identify the paternity of children, hence, there is no affection or close sympathy existing between husbands and children, such as is recognized where monogamous marriages prevail. It is equally impossible to identify the fatherhood of a child where the sex privileges of the mother are extended to more than one male at or about the time of conception. Jurors are permitted to use their common knowledge and observa-

tions in life, in fact judges could not prevent them from doing so if they would, in determining the weight of evidence admitted for their consideration. When it is shown that a child is conceived through unlawful sex indulgence or commerce, without any appearance of deception, seduction or other extenuating circumstances, jurors are not likely to hold one so unlawfully conceived as the child of any particular male person after his lips are closed in death, and where the truth of a charge of paternity of an illegitimate child would work a heavy loss upon a widowed wife, unless the proof be quite direct, or the circumstances such as to make the evidence convincing.

The jury probably considered the written statements of the assured in his application, though not made under oath, showing that he occupied the important position of train dispatcher, and that his father died at the age of 33 years from injuries sustained in a runaway accident, while the evidence shows that Joseph Rist died at the age of 24 years of a slow, wasting type of consumption. It was probably impossible for the jury to reconcile these statements as both referring to Joseph Rist. Barbara Mauch, a half-sister of Joseph Rist, who took care of him through his long illness, swore that she did not know the assured either personally or by reputation. There was no one to whom Ellen Burns was so likely to give the true surname of the father of her child as to the child itself. The history of court proceedings often show that mothers of unlawfully conceived children, for various reasons, charge different male persons of being the father of the same child, and for these and other reasons it becomes the duty of courts and juries to closely scrutinize the evidence before placing the fatherhood of a child upon any accused person under such circumstances as are shown in this record.

One of the leading authorities on evidence states the rule as follows:

“It is hardly necessary to add that, while hearsay declarations as to pedigree * * * are admissible, and often valuable in the absence of other evidence, it must be borne in mind that such declarations are subject to many of the objections which may be urged against hearsay evidence, and hence are to be received with considerable caution. Family pride may have tempted the declarant to allege or deny the relationship; and, although persons may be presumed to know the facts connected with their own family history, yet, as is well known, this presumption is often contrary to the fact.”—Jones on Evidence, 2nd Ed., sec. 317.

Contrary to the general practices of those who are regarded as reputable witnesses, the half-brother and aunt of the assured seemed to have been very willing witnesses for the appellant in its endeavor to avoid payment of the policy to the assured's wife. That may have been, if we put the proper interpretation on the evidence, a scrupulous endeavor to willingly tell the whole truth on the part of the witnesses. It was, however, for the jury, and not for us, to say whether this was in pursuance of a purpose of the sister and son of Ellen Burns to save her good name as much as possible. We think, under the character of the evidence and the circumstances, it was for the jury, and not for this court, to say whether the appellant showed by a preponderance of the evidence that Joseph Rist was the father of the assured. They must have found this issue in favor of the appellee.

The next serious question urged by the appellant for a reversal is that the assured made a false representation as to his having other insurance when he made his application to the appellant for a policy. The statement complained of is as follows: “I am insured in other companies and associations, as follows: None and in no others.”

It appears from the evidence that, at the time the

answer was given the assured held a policy in the Prudential Insurance Company of America for \$500. This question, with the materiality of the statement, was submitted to the jury on instruction number 14, given at request of appellant, which reads as follows:

“If you believe from the evidence that said Harry E. Good at the time of making the application for said policy held a policy of insurance on his life in the Prudential Insurance Company of America, and was in fact then insured, and if you further believe that the defendant company would not have issued the policy of insurance sued upon had said company been truthfully informed in regard to said other insurance, your verdict will be for the defendant.”

The jury must have found that the defendant company would have issued the policy sued upon if it had known of the existence of the policy held by the assured in the Prudential Insurance Company.

At an early day insurance companies concluded that, from time to time, persons, who were without means or embarrassed in their affairs or burdened with impaired health, obtained large insurance upon their lives and resorted to self-destruction largely for the purpose of bestowing comfort upon their families; hence, life insurance companies generally interrogate all applicants as to other insurance, and the courts generally recognize the rights of such companies to provide for forfeitures, if the application is made a part of the policy and the answers are false. However, some of the courts and many of the legislatures have limited such rights of forfeiture to cases where juries find that the policy would not have been issued if the companies had known the truth. This case was tried upon the assumption that the jury must find that the appellant would not have issued the policy of insurance sued upon had the company been truthfully informed in regard to the existence of the other policy.

This question was submitted to the jury on instruction number 14 above quoted, tendered by appellant without objection on the part of the appellee, and, under these conditions, we do not understand that the appellant is now at liberty to question the finding of the jury on this phase of the case.

In *L. D. G. M. Co. v. A. G. M. Co.*, 30 Colo., 431-435, 71 Pac., 389, the supreme court said:

“The court adopted their (appellant’s) theory in answering the question of the jury, and, whether right or wrong, is wholly immaterial, because appellant is bound by the theory which its counsel advocated, and which the court adopted.”—*Witcher v. Gibson*, 15 Colo. App., 163-174, 175, 61 Pac., 192; *De St. Aubin v. Marshall Field Co.*, 27 Colo., 414, 62 Pac., 199; *Denver, etc., R. R. v. Ryan*, 17 Colo., 98-104, 105, 28 Pac., 79; *Denver v. Stein*, 25 Colo., 125-128, 53 Pac., 283; *D. & R. G. R. R. Co. v. Peterson*, 30 Colo., 77-87, 69 Pac., 578, 97 Am. St. Rep., 76; *Mountz v. Apt*, 51 Colo., 497, 119 Pac., 150.

In *Pacific Mutual Life Insurance Co. v. Van Fleet*, 47 Colo., 401-406, 107 Pac., 1089, the statement of the assured was, “I have never received or been refused compensation for accidental injuries or sickness, except as herein stated.” The applicant made no statement of what he received. The evidence showed he had been insured in a mutual association, had been injured and received compensation for the injury, and the company asked a forfeiture because of the alleged false statement. The supreme court said:

“In what we have already said, we have assumed with defendant, that this answer is equivalent to a statement by the assured that he had never received compensation from an insurance company for an injury. The alleged false answer, on its face, is imperfect and incomplete. It suggests that compensation might have been received.”

The statement of the assured in the case before us, viz.: I am insured in other companies and associations, as follows: None and in no others," is confusing and liable to make the applicant innocently give a wrong answer. If a direct interrogatory had been propounded to him, as: "Have you a policy in any other insurance company?" he could not have been misled thereby. The policy in the Prudential Insurance Company was small, and we see no reason why the assured should have given a false answer, especially since the application stated that an untruthful answer would avoid the policy. However, it is not necessary to decide, and we do not decide, this question or base our decision herein on this point.

It would seem that the policy sued upon did not specifically make the application a part thereof, and many well-considered cases hold under these conditions that the answer in the application as to other insurance is not a warranty, but a representation. The supreme court of Oklahoma, in considering this point on a policy similar to the one before us, issued by the same company to one Morgan, held that such answers are but representations.—*Mutual Life Insurance Company of New York v. Morgan* (Okl.), 135 Pac., 279-281, and cases cited; *Northwestern Life Insurance Co. v. Tietze*, 16 Colo. App., 205-210, 64 Pac., 773; *Security Mut. Life Ins. Co. v. Webb et al.*, 106 Fed., 808, 45 C. C. A., 648, 55 L. R. A., 122; *Webb et al. v. Bankers Life Ins. Co.*, 19 Colo. App., 456-458, 76 Pac., 738.

Appellant's counsel say that:

"The legal effect of such conduct (making false statements as to other insurance) depends upon whether the statement is regarded as a warranty or a mere representation; but in view of the glaring errors in the record, we do not propose to take up the time of the court in discussing this particular statement."

However, for the disposition of this case, it is not

necessary to decide whether the statement as to other insurance is a warranty or a representation, and, as the question was not argued, we prefer to base our opinion on other grounds.

Appellant insists that the trial court abused its discretion in not granting an application for a continuance because of the absence of appellant's subpoenaed witness, Doctor Freiburger. The affidavit for a continuance set forth in detail what this witness would testify to if present, which included extensive treatment of assured for tuberculosis. Counsel for appellee admitted that, if the witness were present, he would testify to the facts set forth in the affidavit, subject, however, to all legal exceptions as to the competency of such matters as evidence. The court overruled the application under section 177, Mills' Annotated Code. We do not think the court abused its discretion in denying the application. At the proper time the appellant offered the entire statement of facts as set out in the affidavit as evidence. Appellee objected to the offer, alleging that it was a confidential communication between doctor and patient. The court cautiously advised counsel that it did not care to pass upon it as a whole, and showed evidence of wanting assistance. Counsel for appellant, however, seemed to direct their entire efforts to having the court's ruling include all material parts of the affidavit, and in saving an exception to the exclusion thereof. No intimation was made that some small part of the long affidavit was not included within the purview of section 8072, Mills' Annotated Statutes, Revised, 1912, which reads:

“A physician or surgeon authorized to practice his profession under the laws of this state, or any other state, shall not, without the consent of his patient, be examined as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.”

In the case of *C. F. & I. Co. v. Cummings*, 8 Colo. App., 541-551, 46 Pac., 875, the court of appeals construed this statute, and held evidence inadmissible, whenever the relation of physician and patient is shown to exist, as to any information which the physician may have acquired by attending the patient. The statute was declared to be as broad as that of any state to which the court's attention had been called, and excluded an examination of the surgeon as to any information which he had acquired while attending the patient, whether the information was deduced from statements or gathered from his professional or surgical examination. The court said:

"It is common knowledge that the eye and finger of the attending surgeon is vastly more expert in locating cause or trouble than the tongue of the most astute patient. The authorities hold that no matter how the information may be acquired, whether it comes to the surgeon in the shape of oral statements, or by reason of his examination, he cannot be interrogated respecting it," and cites in support of its position *Freel v. Market St. Cable Ry. Co.*, 97 Cal., 40, 31 Pac., 730; *Gartside v. Conn. Mut. L. Ins. Co.*, 76 Mo., 446, 43 Am. Rep., 765; *Briggs v. Briggs*, 20 Mich., 34; *Dilleber v. Home Life Ins. Co.*, 69 N. Y., 256, 25 Am. Rep., 182; *Masonic Mut. Ben. Assn. v. Beck*, 77 Ind., 203, 40 Am. Rep., 295; *Colo. Midland Ry. Co. v. McGarry*, 41 Colo., 398-404, 405, 92 Pac., 915.

Counsel for appellant insist in this court, under the decisions of the state of New York, that the trial court should have admitted that part of the statement in the affidavit showing that the physician attended upon the patient, the length of time the disease continued, and the fact that the patient was actually treated. The affidavit states that Good "consulted" the physician, and there is no statement therein as to attendance, length of time of sickness, etc. We think, however, that these mat-

ters were not specifically presented to the trial court, and it was not called upon to pass upon them. It was the duty of counsel, if any parts of the mass of facts set up in the affidavit were competent, to have specifically called the attention of the court to them. The question asked by the medical examiner was "state every physician whom you have consulted in the last five years." Answer: "Doctor Herman, Logansport, Indiana." The trial court had no suggestion from counsel that any part of the affidavit was competent to disprove the answer as given, and was reluctant to pass upon any particular part of the affidavit without the aid of counsel. Appellee insisted that the entire affidavit was incompetent, and counsel for appellant gave no intimation that the parts now relied upon were competent for any purpose. Probably no one connected with the trial had a real doubt as to the incompetency of all the facts stated, unless it was counsel for the appellant, who now rely on portions of the affidavit and urge that they were competent to prove, at least, the allegation of consultation, and possibly a few minor matters. We think counsel should have been as fair to the trial court as they are to the court of review, and have specified such matters as they thought were competent for any particular purposes when the affidavit *en masse* was excluded, and thus have given the trial court an opportunity to pass upon them, as is now done in this court.

In the case of *Denver etc. R. R. v. Ryan*, 17 Colo., 98-104-105, 28 Pac., 79, the supreme court said:

"Any judge in the hurry of a *nisi prius* trial is liable to err unless aided by the vigilance of counsel. From time immemorial it has been a well-recognized and most salutary rule of the common law, that if counsel neglect to object or point out errors occurring at the trial in such time and manner as will give opportunity for their correction, they will not, in general, be heard to complain

of such errors in a court of review. This rule is so reasonable and so essential to the administration of justice that we cannot believe that it could have been the intention of the legislature to overthrow it altogether. Any other rule would enable a party to sit silently by, knowing some error had been committed against his interest of which perhaps no other person was aware at the time, and thus take the chances of a verdict in his favor, while having the sure means of setting aside the verdict if it happened to be against him. The law in this jurisdiction never has permitted, and it is to be hoped that it never will permit, such experiments with judicial proceedings. There will always be enough important questions for review in the appellate courts if parties are required to be vigilant to prevent error in the trial courts."—2 Thompson on Trials, sec. 2394; *Union Min. Co. v. Rocky Mt. Nat. Bk.*, 2 Colo., 248; *McFeters v. Pierson*, 15 Colo., 207, 24 Pac., 1076, 22 Am. St. Rep., 388; *Wray v. Carpenter*, 16 Colo., 271, 27 Pac., 248, 25 Am. St. Rep., 265; *L. D. G. M. Co. v. A. G. M. Co.*, 30 Colo., 431-435, 71 Pac., 389.

Counsel for appellant urge its assignment 12, *i. e.*:

"The instructions of the court were conflicting and tended to confuse, or may have confused, the jury."

This charge is quite true; but appellant tendered the conflicting instructions, the appellee did not object to them, and they were submitted to the jury at appellant's request. Counsel for appellant stated to the court that some of their instructions so requested were framed upon the theory of a warranty and others upon the theory of a representation, and that, when they tendered both, they expected the court to refuse to give either one or the other. There being no objection, however, the court gave both on the assumption that one party tendered them and the other did not object, and, when appellant's counsel intimated that they would except to some of the instructions given at their own request, the court replied:

"I will withdraw any that you except to * * * .
If you want to withdraw them, you may do so."

However, counsel did not except to or offer to withdraw any of them, and thereupon the case was submitted to the jury on the conflicting instructions. Appellants now complain as follows:

"By instructions Nos. 14, 15 and 16 the jury were told the untrue answers and statements of Good did not amount to the dignity of warranties, but were mere representations, and could not be availed of by the company unless the jury believed it relied on such statements in issuing the policy."

Instruction 2, which considered the statements and answers in the application as warranties, and instructions 14, 15 and 16, which considered them as representations, were all requested by the appellant and submitted to the jury without objection, and the appellant cannot now be heard to complain of the instructions given at its request.—*L. D. G. M. Co. v. A. G. M. Co.*, 30 Colo., 431-435, 71 Pac., 389; *Whitcher v. Gibson*, 15 Colo. App., 163-174-175, 61 Pac., 192; *De St. Aubin v. Marshall Field Co.*, 27 Colo., 414, 62 Pac., 199; *Denver v. Stein*, 25 Colo., 125-128, 53 Pac., 283; *Denver etc. R. R. v. Ryan*, 17 Colo., 98-105, 28 Pac., 79; *D. & R. G. R. R. Co. v. Peterson*, 30 Colo., 77-87, 69 Pac., 578, 97 Am. St. Rep., 76; *Mountz v. Apt*, 51 Colo., 497, 119 Pac., 150.

Under instructions 14, 15 and 16, the jury was permitted to consider the materiality of the statements and answers made in the application, and, from the nature of its verdict, it is to be presumed that this question was resolved in favor of the appellee.

The judgment is affirmed.

Decided November 10, A. D. 1913. Rehearing denied December 8, A. D. 1913.

[No. 3737.]

TATE ET AL. V. HOLLY ET AL.

1. **APPEALS—*Finding on Conflicting Evidence***, is conclusive on appeal.
2. — ***Questions Not Presented Below***. Objections to instructions which were not called to the attention of the trial court will be disregarded on appeal.
3. — ***Harmless Error***. Generally one will not be heard to complain of an error which is to his profit.
4. **NEW TRIAL—*Verdict Substantially Conforming to the Evidence***, will be sustained.
5. **BILL OF EXCEPTIONS—*Time of Filing***. There is no limit of time within which the bill of exceptions must be filed with the clerk. If certified by the clerk to the court of review, as part of the transcript, this is sufficient evidence of its timely filing. That it bears a file mark as of a day antecedent to its authentication by the judge is unimportant.

Appeal from Otero District Court. HON. J. E. RIZER, Judge.

Mr. G. M. DAMERON, Mr. JULIUS C. GUNTER, and Mr. MALCOLM LINDSEY for appellants.

Mr. FRED A. SABIN and Mr. C. E. SABIN for appellees.

BELL, J.

This case was tried to a jury and resulted in a verdict in favor of the appellees in the sum of \$1,465.98, upon which judgment was duly entered. The record discloses that on July 19, 1907, appellants sold and delivered to appellees, at Cherry Creek, Nevada, two carloads of horses, and contracted to sell them two hundred head more of the same quality at \$10.00 per head, deliveries to be made at Cherry Creek every two weeks thereafter; and, upon this contract, appellees advanced the sum of \$100.00. The first delivery under the contract should have been made August 2, 1907. The appellees sent two men from Colorado to Cherry Creek, and had them there

on that day, to receive this delivery, but no horses had been gathered, and the men consumed fourteen days in trying to get a shipment on the contract, but failed, and returned to Colorado, after incurring an expense of something like \$200.00. It would seem that appellants intended to make a delivery about August 17th, and so informed Mr. Taylor, one of the men sent to receive the first delivery, and also wrote the appellees to the same effect; but appellee Grimsley, who was acting in the matter for the appellees, did not learn of it until about the 21st or 22nd of August. He then immediately wired appellant Tate, and started at once from Denver to Cherry Creek to receive a shipment, and arrived in Cherry Creek August 24th, a few hours after appellants, as they informed him, had sold 124 head at a profit of \$3.00 per head above the price appellees had contracted to pay. Grimsley then went upon the range with appellants, and, by September 6th, they had brought into Cherry Creek one hundred head of horses, seven of which, he testified, were crippled, blind or too thin to meet the provisions of the contract. He offered to accept three carloads, or eighty-four of this one hundred head, but refused to accept a part carload, because, he insisted, that the contract provided that all deliveries should be in full car lots, and appellants refused to deliver any, unless all were accepted, except such as were blind, or lame, or not of the quality contracted for, and offered to return the amount of \$100.00 advanced on the contract and pay \$150.00 to have the contract cancelled. Grimsley declined this offer, and returned to Colorado, and he testified that the expenses of this trip and the value of his time, which he fixes at \$5.00 per day, amounted to \$157.10.

There is a close agreement in the testimony of the parties as to the leading features of the contract and the dates of delivery. However, the appellants made some claim that the \$100.00 paid on the contract was intended

as a forfeit, and that the men sent by the appellees to receive the first delivery did not spend the fourteen days necessarily in Nevada, but had consumed a portion of the time in visiting for their own pleasure; and, in the argument of counsel, at least, it is contended that a part or all of the expenses would have been necessary if the horses had been delivered according to contract. However, both parties admit in their testimony that, if the horses had been delivered, the railroad companies would have furnished transportation, and the only dispute about the contract which caused its abandonment was as to whether the horses were to be delivered in full car lots, or whether the appellees were obliged to accept all of the one hundred head, which included less than a half carload more than three full carloads of the quality bargained for. The jury, in finding the issues for the appellees, must have found this decisive point in their favor, and, having so determined it on conflicting evidence, the result is binding on this court.—*R. R. Co. v. McDonough*, 54 Colo., 515-517, 131 Pac., 402.

The court instructed the jury that, if they should find for the appellees, the damages should be computed upon the difference between the price of \$10.00 per head, for which appellants agreed to furnish said horses, and the amount which the testimony showed the appellees would have received for the same upon the sale thereof, less the expense to the appellees in transporting said horses from the point of delivery to the place of sale; that, if they should find that the appellants failed to comply with their contract to deliver the horses, and that, by reason thereof, the appellees were put to expense in sending men to Cherry Creek, the place of delivery, the appellants were liable for all necessary and reasonable expenses that the appellees suffered in preparing to receive said horses, as shown by the evidence; and that, if they found from the evidence that the appellees paid to the

appellants the sum of \$100.00 as a part payment on the horses, and that the same had not been returned, nor legally tendered back to them, and that appellants had failed to comply with their contract, they then should find in favor of the appellees for said sum of \$100.00.

Counsel for appellants say: "We note that there are three elements of possible damage in this case (the profit on the horses, the expenses incurred in preparing to receive them, and the advanced payment), and that the court wrongfully instructed the jury as to each one of these three elements." If we should agree with counsel, under the practice in this jurisdiction, we are unable to see wherein we could aid the appellants, as no objection whatever was made to the giving of these instructions, nor was there any aid tendered the trial court in avoiding the alleged errors. Counsel are officers of the courts, and are charged with the duty of vigilantly guarding them against errors at trials, and, where they fail to give warning by objection or other appropriate means when an error is threatened against the interests of their clients in the trial courts, they should not be aided in correcting here what they might have prevented there. Our supreme court, in the case of *Keith v. Wells*, 14 Colo., 321-326, 23 Pac., 991, in considering an alleged error, to which a general objection was directed at the trial, but which was not specifically presented until upon appeal, tersely said that, if the points, which were presented to it, had been called to the attention of the trial judge, the court of review could not say what his rulings thereon would have been; and that it would be manifestly unfair, not only to the trial court, but also to the opposite party, to consider errors assigned to the instructions upon appeal, based upon matters that were not called to the attention of either upon the trial. In *Denver R. R. etc. v. Ryan*, 17 Colo., 98-104, 28 Pac., 79-81, our supreme court said:

“From time immemorial it has been a well-recognized and most salutary rule of the common law, that if counsel neglect to object or to point out errors occurring at the trial in such time and manner as will give opportunity for their correction, they will not, in general, be heard to complain of such errors in a court of review. This rule is so reasonable, and so essential to the administration of justice, that we cannot believe it could have been the intent of the legislature to overthrow it altogether. Any other rule would enable a party to sit silently by, knowing some error had been committed against his interest, of which perhaps no other person was aware at the time, and thus take the chances of a verdict in his favor, while having the sure means of setting aside the verdict if it happened to be against him. The law in this jurisdiction never has permitted, and it is to be hoped that it never will permit, such experiments with judicial proceedings. There will always be enough important questions to review in the appellate courts if parties are required to be vigilant to prevent error in the trial courts.”

See also, 2 Thompson on Trials, sec. 2394; *Union Min. Co. v. Rocky Mt. Nat. Bk.*, 2 Colo., 248; *McFeters v. Pierson*, 15 Colo., 207, 24 Pac., 1076, 22 Am. St. Rep., 388; *Wray v. Carpenter*, 16 Colo., 271, 27 Pac., 248, 25 Am. St. Rep., 265; *Edwards v. Smith*, 16 Colo., 529, 531, 27 Pac., 809; *Supreme Lodge K. of H. v. Davis*, 26 Colo., 252, 263, 58 Pac., 595; *Beals v. Cone*, 27 Colo., 473, 488, 62 Pac., 948, 83 Am. St. Rep., 92.

We do not intimate that counsel in this case sought to obtain any advantage by not objecting, as all participants at the trial seemed to approve of the proceedings, and we are not able to say that substantial justice was not obtained by means thereof. All litigants are guaranteed a trial in strict conformity with the established rules of law and practice, but it is optional with them whether

they follow these rules, or liberalize them, as was done in this case wherein each side told its whole story, and had its own instructions given to the jury, without objection from the other; but, when they elect to make their own rules for the trial of their cause, we are relieved of the duty, and generally deprived of the privilege, of granting relief therefrom on review.

Appellants set up five different measures of damages, which they say are correct under appropriate conditions, the fifth of which reads as follows:

“If the article in question has a market price, that will usually control as the best evidence of its value. If this test has been applied by an actual sale of it, the fact may be proved as evidence of its value.—3 Sutherland on Damages (3rd ed.), sec. 654, p. 1897.”

They discard their first four selected rules for the measure of damages as not being applicable to the “legal evidence,” and say:

“On the other hand, if the jury had taken the true measure of damages (the fifth, above quoted), they should have taken Tate’s testimony, which was the only evidence of market value, and found the value to have been \$15.74 per horse, and, deducting therefrom the \$10.00 contract price, this would have left the damages at \$5.74 per horse, or \$1,148 in all.”

To this last stated amount counsel for appellants argue that the jury should have added the amount of appellees’ expenses and the advanced payment made on the contract, which would total \$1,605.10, or \$139.12 more than the amount of the verdict rendered, and, upon this, they insist that the jury followed neither the instructions of the court, nor the evidence of either party, and that, therefore, their verdict as returned should be set aside. A smaller verdict than the evidence justified, if their position is well taken, is an error in their favor, and, generally speaking, they are not permitted to object

to this result. However, we do not understand that the instructions of the court were such as to require the jury to find for the appellees in any fixed amount of expenses. The jury, under the instructions as given, were free to determine the amount of necessary and reasonable expenses incurred by appellees in preparing to receive the horses, and divers good reasons exist in law, and appear in the evidence, to justify the jury in disallowing a portion of the expenses as testified to. If this had been done, the verdict as rendered could be made to conform to the evidence of appellants and the measure of damages and reasoning presented by their counsel. Other computations, under the condition of the record before us, might well be made and accomplish the same result; but it is not within our duties to endeavor to discover the exact methods or reasoning resorted to by a jury in reaching the amount of its verdict. To sustain a verdict it is ordinarily sufficient if the court of review can determine a substantial agreement between it and the evidence.

The court gave no instructions of its own motion, and the parties requested none on certain phases of the evidence, but this did not deprive the jury from considering any evidence admitted by the court in reaching a verdict.

Objection is made to the consideration of anything in the bill of exceptions, because, it is said that it was prematurely filed. The record shows that it was filed with the clerk on the 23rd day of November, 1910, before it was signed by the judge; that on the 28th of November it was tendered to the judge, signed by him on the 27th day of December, 1910, and there is no evidence as to when it was re-filed with the clerk. There is a time limit within which a bill of exceptions must be tendered to the judge, but there is no time limit within which it must be filed with the clerk. There is a file mark evidencing the premature filing, but none showing the proper filing. The

marking of a paper filed merely preserves in writing evidence of the filing, the absence of which may be otherwise supplied. That the bill of exceptions was regularly certified by the clerk of the trial court to the appellate court as a part of the transcript is sufficient evidence of the timely filing.—*Eldred v. Malloy*, 2 Colo., 20-23.

We find no reversible error in the record, and, therefore, the judgment is hereby affirmed.

Affirmed.

MORGAN, J., dissenting.

MORGAN, *Judge, dissenting*:

An action for damages for the breach of a contract for the purchase or sale of personal property is, oftentimes, as in this case, nothing more than a claim for the benefit of the rise or fall in the market price of the commodity purchased or sold, even when a future delivery is actually intended; and the wisdom of the law, as announced in many adjudicated cases, has limited a recovery in such instances, except as to some special damages suffered, to the difference between the contract price and the market price at the time and place of delivery, or, if there be no market there, then the value, at such place, to be determined by the market price at the nearest place where there is a market, less the extra expense of delivery thereat. This is a wholesome general rule, "made in gross for men in the mass," and especially honored for the circumscribed limitations under which it must be applied. It tends to promote certainty and stability in business, by permitting a recovery, under the limitations, sometimes in the nature of a penalty (as stated in my dissenting opinion in *Leeper v. Schroeder*, 24 Colo. App., 164, 132 Pac., 704), beyond the actual loss of the party suing.

In this case no actual loss occurred to the plaintiff,

except the expense proved and the \$100.00 paid, which he should recover by the ordinary procedure. The lower court, however, submitted an erroneous rule as to the measure of damages, by instructing the jury that the plaintiff was entitled to recover the difference between the contract price and what the testimony shows he would have received upon the sale thereof, less expenses of transportation to the place of sale, without further limitation as to such measure; although the plaintiff pleaded that he would have received \$27.50 a head for the horses at La Junta, Colorado, and testified to the same effect, and defendant testified to a sale of ninety-seven head at St. Louis, Missouri, at \$15.30 a head, net, and to a sale of one hundred and ninety-seven head at Cherry Creek, Nevada, at \$13.00 a head, net.

Now, the place of delivery was Cherry Creek, and the plaintiff did not prove that there was no market at the latter place, or that the horses had no value there, or that either of the other places was the nearest market thereto; and the motion for a new trial should have been granted, on the grounds stated in the motion that the verdict was contrary to the instructions and the evidence, and not warranted thereby.

“Where the verdict is not in harmony with the instructions and is not supported by any evidence, the judgment must be reversed.”—*Hassell L. W. Co. v. Cohen*, 36 Colo., 353, 85 Pac., 89.

The majority opinion concedes the instruction was wrong, but permits a recovery of \$1,465.98, upon the theory that the jury adopted the price received in St. Louis, and thus followed the instruction given, and for the further reason that counsel for the appellant, in their brief, say the jury never even followed the “true measure” of damages based on the sale in St. Louis. The majority opinion thus discloses a disposition to enforce the general rule as to the measure of damages, but over-

looks the limitations circumscribing it, and discloses an effort to allow a recovery regardless of the limitations, and affirms the judgment for a sum of money largely in excess of what seems to me a just amount. As indicated in the majority opinion, the plaintiff testified that he "tried to settle there for his expenses and his money back—the \$100.00; that this was \$300.00, and the \$100.00 made \$400.00."

The evidence furthermore discloses the value of the horses at the time and place of delivery, by a sale, *made there*, of "one hundred and ninety-seven head" at \$13.00 per head at the time of delivery, as shown by plaintiff's and defendant's testimony. This evidence shows the measure of damages to be, in this case, \$3.00 per head, and a judgment for \$600.00, and the actual expenses incurred, together with the \$100.00 paid on the contract, would have been the only judgment permissible under the testimony.

I think we should not hold the appellant to the mere statement by way of argument in the brief that "the true rule of law" was based on the St. Louis sale, as to the measure of damages, as such statement is made for the purpose of the argument, and to argue that the jury never even followed *that* rule; nor that we should take the testimony of the defendant as to the sale in St. Louis as a test, as such testimony was introduced merely to show that the plaintiff was not justified in refusing to accept the same horses when they were offered to him at Cherry Creek, and thereby broke the contract himself. There was no evidence that St. Louis was the nearest market, and there *was* evidence showing a value at Cherry Creek. Neither do I think that appellant's failure to object to the erroneous instruction should be considered as an agreement on his part that such instruction was correct. I concur in the view that the lower court should be advised concerning errors in instructions in order that

it may correct the same; but where, as in this instance, the jury did not follow the instruction, and the plaintiff failed to prove the necessary facts upon which to predicate the correct rule as to measure of damages, and where the error could have been corrected, when called to the court's attention in the motion for a new trial, the necessity of an objection, and the failure to make it, should not be considered fatal to the appellant's contention, considering that exceptions were duly allowed to the ruling of the court denying a new trial. Such rigid enforcement of a rule of practice should not be enforced, except to prevent injustice, or in instances where no injustice will be done. The size of the verdict in this case indicates that the jury were influenced by the erroneous instruction, although they never followed it to the extent of rendering as large a verdict as it commanded; but the verdict clearly indicates that they were left at sea, and, drifting into conjecture, found a verdict that cannot be definitely predicated upon any instruction or upon any evidence in the case.

It is apparent to my mind that the case was tried and the verdict rendered upon no true rule of law as to the measure of damages and upon insufficient evidence upon which to base such a rule, and I think a judgment based upon such a verdict ought not to stand. The judgment should be reversed.

[No. 3400.]

CALIFORNIA MILLING & MINING COMPANY, LTD., v. THE
ROCKY MOUNTAIN NATIONAL BANK ET AL.

Judgment reversed on the authority of *Sykes v. Kruse*, 49 Colo., 560.

Error to Gilpin District Court. HON. FLOR ASHBAUGH,
Judge.

Mr. HENRY J. HERSEY, Mr. ARTHUR PONSFORD, Mr. WILLIAM E. HUTTON, and Messrs. DAYTON & DENIOUS for plaintiffs in error.

Mr. H. A. HICKS, Mr. L. J. WILLIAMS, and Mr. C. W. WATERMAN for defendants in error.

MORGAN, Judge.

The error assigned herein, upon which the argument is based, is to the ruling of the lower court sustaining a general demurrer to the plaintiff's complaint. The recent opinion of the supreme court in the case of *Sykes v. Kruse*, 49 Colo., 560, 124 Pac., 596, handed down since the filing of the original briefs herein, determines the contention here in favor of the plaintiffs in error, and makes it unnecessary to write an extended opinion. In that case the supreme court had before it a motion to strike a counter-claim in which the same allegations, in substance, were made as those contained in the complaint herein, involving, practically, the same subject matter, and the opinion of the supreme court in that case, holding that the lower court erred in sustaining the motion to strike out said counter-claim, is for all purposes applicable to this case, and the same in effect, as to hold that the ruling of the lower court in this case sustaining the demurrer to the complaint was error requiring a reversal of the judgment. The opinion of the supreme court is so direct and positive and so applicable in all respects to the contention here that the judgment of the lower court in this case is hereby reversed and the cause remanded for further proceedings, upon the authority of the ruling of the supreme court in *Sykes v. Kruse, supra*.

[No. 3650.]

**THE MONTE VISTA LAND COMPANY ET AL. v. THE SAN LUIS
VALLEY IRRIGATED LAND COMPANY.**

**JUDGMENT OF SUPREME COURT DETERMINING ALL MATTERS IN THE CON-
TROVERSY—Effect.** Appellee had obtained a decree permitting it to
change the point of diversion of certain waters, to which it claimed to
be entitled. Pending an appeal from this decree the appellants had, in
another suit, obtained a judgment of the supreme court to the effect
that the water so claimed by appellee had been abandoned, and that
appellee had no right therein. That judgment was held conclusive of
all matters involved in this appeal. The decree of the district court
was reversed, and the cause remanded, with directions to the district
court to deny the petition.

Appeal from Costilla District Court. HON. CHAS. C. HOL-
BROOK, Judge.

Messrs. CORLETT & CORLETT, Messrs. GOUDY &
TWITCHELL, Mr. IRA J. BLOOMFIELD for appellants.

Mr. JESSE STEPHENSON for appellee.

KING, J., delivered the opinion of the court.

On June 8, 1909, The San Luis Valley Irrigated Land
Company, appellee herein, filed its petition in the district
court of the twelfth judicial district, in and for the county
of Costilla, for the purpose of obtaining a decree changing
the point of diversion of 12.8 cubic feet of water per sec-
ond of time, priority No. 237, from the Alamosa Town
Ditch to the head of the San Luis Valley canal. After
trial, the petition was granted, and appeal taken to the
supreme court, and the cause transferred to this court,
as provided by chapter 107 of the session laws of 1911.

On the 7th of October, 1909, the appellants here
brought their suit in the district court aforesaid against
the appellee herein, and others, to obtain a decree declar-
ing an abandonment of the water right decreed to the

Alamosa Town Ditch, being the same water involved in the petition herein. That cause reached the supreme court, by which it has been finally decided and adjudged that said water right had been abandoned prior to the time appellee herein acquired its alleged interest therein. —*The San Luis Valley Irrigation District v. Town of Alamosa*, 55 Colo., 386, 135 Pac., 769.

That decision of the supreme court, holding that the Alamosa Town Ditch has no water rights, is conclusive of all matters involved herein, and makes any further consideration of this appeal unnecessary; and, predicated thereon, the judgment of the district court in this cause is reversed and the cause remanded, with directions to the trial court to enter judgment denying the petition.

[No. 3834.]

MILLER V. WESTON ET AL.

1. COUNTY COURT—*Jurisdiction—Presumptions.* The county court, in the administration of the estate of deceased persons, is a court of general and unlimited jurisdiction.

It acquires jurisdiction of a particular estate by proof of the death, and petition for letters of administration thereon, or letters testamentary.

The question of the residence of the decedent is a question of fact, to be determined by the evidence, and, nothing appearing to the contrary in the record, it will be presumed that the court examined and determined the question in favor of its jurisdiction.

The jurisdiction, once acquired, continues until lawfully divested, and this without regard to the probate of an alleged will of the decedent, which is but one incident of the jurisdiction of the subject matter.

2. — *Objections to the Jurisdiction—Time of.* The provisions of Rev. Stat., sec. 7102, that administration of the estate of every decedent shall be had in the county court of his last known residence is mandatory; but it may nevertheless be waived. The county court of Park having assumed jurisdiction of the probate of the will of a decedent, a

contestant appeared, filed a *caveat* denying the authenticity of the will, and alleging the invalidity thereof upon various grounds; and, without any mistake or inadvertence, proceeded to the trial of the issues joined upon his *caveat*, without objecting in any manner to the jurisdiction of the court. *Held* that he thereby waived all objection to the jurisdiction of the court upon the ground that the county of Park was not the county of the last known residence of the deceased.

3. **APPEALS—County to District Court—Effect.** Under sec. 7254 of the Revised Statutes, an appeal lies to the district court from any final determination of law or fact in the county court relating to the administration of any decedent's estate, without interrupting proceedings as to other matters, or submitting to the district court any question as to the administration, or any other question than that, from the determination of which the appeal is prosecuted.

4. **VENUE—Change of—Time of Application.** An application for the change of the venue, first interposed after the issues have been made up and the cause is ready for trial, is not in apt time.

Stronger reasons dictate the importance and necessity of expedition in will contests, and other causes affecting the administration of estates, than in ordinary civil causes.

5. — **Local Prejudice.** An application for a change of venue, in a will contest, on the ground of local prejudice, and for the convenience of witnesses, is within the discretion of the trial court. Its determination will not be disturbed if no abuse of the discretion appears.

6. **WILLS—Contest—Directing Verdict.** In will contests, the court has the same power to direct a verdict as in ordinary civil causes. Whether error is committed is to be determined by the same rules in both cases.

7. — **Interpretation.** The intention of the testator is to be ascertained from the entire context of the will, and must be given effect if not prohibited by law.

8. — **Invalid Provision,** not so inseparably connected with other valid clauses that if stricken therefrom the general purpose of the testator will be defeated, will be rejected, and the residue established.

9. **PERPETUITIES—The Rule Against,** in this state, prohibits the suspension of the fee in lands, or the vesting of title to personalty, for a longer period than that of designated lives in being at the time of the death of the testator, and twenty-one years and nine months thereafter.

10. — **Will Construed.** The testator bequeathed his entire estate by words of present gift to certain relatives and friends, directing his executors to convert all his property into money and make the distribution. He appointed persons named "executors of this, my will, and

trustees of my property, real and personal, and all rights and credits, to whom, *on the admission of this will to probate*, the title of my said property shall go, in trust, however, for the realization of said rights and credits, and the conversion into money of said real estate and personal property * * * and the distribution of all the proceeds," etc. In other provisions he enjoined upon the executors the immediate sale of all his property and the distribution of the proceeds. Except as produced by the words italicized, there was no suspension of the fee in lands, the vesting of the title to the personalty, nor of the power of alienation. *Held* that the will must be read in connection with the statute (Rev. Stat., sec. 7088); that the words "on the admission of this, my will, to probate" have no other or different effect, in substance, than the words of the statute; that considering the other provisions of the statute, requiring the executors to institute proceedings for the probate of the will within thirty days after the testator's death (Rev. Stat., sec. 7103), a presumption should be indulged that the will will be admitted to probate, certainly within the period of some life in being and twenty-one years thereafter, and, there being no precedent life estate, such presumption should be so conclusive that the bare possibility to the contrary should not be regarded as involving a violation of the rule against perpetuities.

Held further, that the words "to whom, on the admission of this, my will, to probate, the title of my said property shall go," may be rejected, and that, rejecting this clause, a valid power in trust to sell, convert and distribute was created and that the will, as a whole, might be sustained, without the offending clause.

Appeal from Park District Court. HON. CHARLES CAVENDER, Judge.

Mr. JOHN T. BOTTOM, Mr. EDWARD C. STIMSON, Mr. GEORGE A. MILLER, *pro se*, for appellant.

Mr. G. K. HARTENSTEIN and Mr. M. I. O'MAILIA for appellees.

KING, J., delivered the opinion of the court.

This case presents for determination the contest of a written instrument purporting to be, and presented for probate as, the last will and testament of David F. Miller, who died in Canon City in December, 1906. Miller was

a pioneer of Park county, Colorado, having lived there continuously from 1862 until about the year 1900, after which time he appears to have made his headquarters in Denver. That he left Park county and came to Denver with the intention of changing his domicile from Park county, where he had resided for almost forty years, does not appear. He had no family dependent upon him at that time. His wife had died, and the other members of his family (his son and three foster children) were grown and had established homes of their own. While in Denver, Miller lived in the family of others, and made no attempt otherwise to establish a home of his own in that city. He made frequent trips to his ranch in Park county, and spent considerable time there. The record does not disclose the relative portion of the time spent in Denver and upon the ranch, but apparently he would go back and forth between Denver and his ranch, during the summer months, and on different occasions visited in California. The record is silent as to the circumstances of his death, or how long he had been in Canon City at the time of that event. We infer, however, that he was there temporarily. Whether he was a resident of the City and County of Denver at the time of his death, or that Park county was still "the county of the last known residence of such testator," is urged as one of the important questions for our determination. Some of the records of the county court which should have been certified to the district court, and presumably were lodged therein, are not preserved in the transcript, and therefore some matters are indefinite, such as dates when and just what proceedings actually took place in the county court. It appears from the certificate of the clerk of the district court that there had been filed in his office "a certain appeal bond in an appeal from a judgment of the county court of said state in and for said county of Park, together with a transcript of said judgment, and the pleadings and files in a certain

cause theretofore pending in said court entitled, "In the Matter of the Last Will and Testament of David F. Miller, Deceased," but no part of said transcript from the county court appears in this court, with the exception of an amended caveat and demurrer thereto, the order overruling the demurrer, and the answer to the amended caveat. However, it is admitted that after the death of David F. Miller, the appellees, who are named as executors and trustees in the will, presented to the county court of Park county what purported to be the last will and testament of said David F. Miller, and that the person named as executors were by the said court appointed administrators to collect pending the probate of the will. It is shown that George A. Miller, the appellant, filed his caveat at some date not shown by the record, and on January 18, 1909, his amended caveat, in which he alleged that the paper writing presented as the will of David F. Miller was not his will, nor the codicil his codicil; that at the time of executing the same, the testator was not capable of executing a last will and testament and codicil, and, if executed, they were executed under undue influence of certain persons in said caveat named; and, further, that said paper writing, if a will, is void for that it violates the law and rule of perpetuities. Upon this caveat and the answer thereto the issues were made and trial had, resulting in a judgment sustaining the will, and admitting it to probate. From said judgment an appeal was taken to the district court of Park county. In pursuance of said appeal, the transcript, as it appears herein, was filed in the district court April 10, 1911. On May 22, 1911, the case came on for trial in the district court, resulting in a judgment rendered and entered upon a verdict directed by the court, sustaining the will. From said judgment, the case is brought to this court on appeal. There is nothing in the record to explain the delay from December, 1906, the date of testator's death, to April 10,

1911, when the papers on appeal were filed in the district court, which time, unexplained, seems unduly long.

I.

When the case was called for trial in the district court May 22, 1911, appellant for the first time interposed a motion for change of venue to the City and County of Denver. This motion was based upon the grounds (1) that Park county was not the proper county for probate of the will, because, as it was alleged, the testator at the time of his death was a resident of Denver, and that the greater part of his personal estate was kept and found in the City and County of Denver; (2) that the contestant could not have a fair trial in the county of Park, because of the interest of the district judge of said county in the subject matter of the litigation, and of his undue influence tending to prejudice the people of the county against contestant; (3) of convenience of witnesses. This motion was overruled, and error is assigned thereon and urgently insisted upon, both in the written briefs and oral argument.

The provisions of two statutes are involved in this motion, *viz.*, sections 7900 and 8043, Mills' Ann. Stats. 1912 (7102 and 7254, Rev. Stats. 1908).

“The administration of all estates of persons dying testate or intestate, and of all minors and persons mentally incompetent, shall be had in the county court of the county of the *last known residence* of such testator, intestate, minor or mental incompetent, or if he had no residence in this state, then in the county court of the county wherein his personal estate or the greater part thereof may be found, but if he left no personal estate, then in the county court of the county wherein his real estate, or the greater part thereof, is situated.” * * *

—Section 7900, Mills' Ann. Stats. 1912; 7102, Rev. Stats. 1908.

“All questions of law and fact, relating to probate matters, or arising in proceedings under this act, in any county, shall be determined by the county court of such county, and from any and all final judgments or decrees upon any such questions, appeals or writs of certiorari shall lie to the district court of the same county, and from the district court to the court of appeals or supreme court, or from the county court to the court of appeals or supreme court, as in other cases, to be allowed, and prosecuted in the same manner as appeals or writs of certiorari, respectively, when prosecuted in civil or law cases from the decisions of such county or district courts;

* * * In all such appeals it shall be the duty of the appellate court, when any such question shall have been finally passed upon, to transmit, or cause to be transmitted, by the clerk thereof, to the county court from which such appeal was taken, a transcript showing the disposition of such appeal, whereupon such county court shall proceed in accordance with such finding, order or disposition thereof by such appellate court.”—Section 8043, Mills’ Ann. Stats. 1912; 7254, Rev. Stats. 1908.

Appellant’s motion was supported by his affidavit, that all of the personal effects of the testator at the time of his decease were, and for a long time prior thereto had been, in the City and County of Denver, except a few things that he had left on a ranch in Park county, “and that he had taken up his home in said City and County of Denver.” This affidavit was not disputed by any counter-affidavit offered directly for that purpose. Appellant’s contention is that the provisions of section 7900, that the administration of all estates of persons dying testate or intestate shall be had in the county court of the county of the last known residence of such testator or intestate, are mandatory, and cannot be waived; that, therefore, on the filing of the motion and affidavit aforesaid demanding a change of venue, the district court was

deprived of jurisdiction, except for the purpose of granting the change. That the provisions of said statute are mandatory is conceded, but it does not necessarily follow that the motion may be first made in the district court, nor that such requirement may not be waived. The county court, in matters of administration of estates, is a court of general and unlimited jurisdiction, and, therefore, if properly invoked, had unquestioned jurisdiction of the entire subject matter, of which the probate of the will is but one incident, and which jurisdiction, when once acquired, would continue until lawfully divested, without regard to the determination of the probate of the will. Its jurisdiction over the special case, or particular subject matter of an individual estate of some deceased person, is acquired by proof of death, and petition for administration, or letters testamentary, as the case may be, which proof of death and petition form a part of the pleadings. We think that the question of the jurisdiction of the county court over any particular estate must first be raised in the county court and determined there, and, if not so raised and determined and an appeal therefrom taken, it cannot thereafter, ordinarily, be raised in the district court, or elsewhere than in the county court, unless the defect of jurisdiction appears upon the face of the pleadings filed in the county court, so that the records of that court, transmitted to the district court, affirmatively show a lack of jurisdiction. The question of residence is a question of fact, which can only be determined by evidence, and which, in the absence of a showing by the record, must be presumed to have been ascertained and determined by the county court in favor of such jurisdictional facts. There is a marked distinction between the provisions of the statute relative to the practice in appeals from the county court in ordinary civil matters, and appeals in probate matters, which will be observed by reading the statute quoted (section 8043, *supra*). It

is evident from such provisions that a judgment upon any question, either of law or of fact, determined by the county court in probate matters may be appealed to the district court, without interrupting the proceedings as to other matters not appealed from, or submitting to that court the pleadings or process pertaining to, or the question of the general administration, or any other question than the one determined and appealed from. A further distinction (between appeals in civil cases and those in probate matters) is found in the closing part of section 8043, in this, that the appellate court, after deciding any such questions brought to it upon appeal, shall transmit a transcript of its record showing the disposition of the appeal, upon which the county court must proceed in accordance with such finding. In the case at bar, two issues only were made by the pleadings—that is, by the caveat and answer thereto—one of fact, to-wit, was the paper writing presented the will of David F. Miller?—one of law, to-wit, if the writing was found to be such will, was it void as offending the rule against perpetuities? No other question relevant to the administration or of probate of the will was appealed from, as shown by this record. The jurisdiction of the district court was purely derivative, acquired by the appeal, and the appeal raised no question of law or fact not raised in the county court, there determined and appealed from, or that is incident to the main question.

Furthermore, we think, and hold, that the jurisdiction of the county court in probate matters, depending upon the residence of the testator or intestate, is one that may be waived by the heirs of intestate, or the heirs and beneficiaries named in the will of testate estates, and that the question of such jurisdiction was waived by the appellant. The administration of this estate had been pending in the county court for more than two years after appellant filed his amended caveat, which constituted his

pleadings in this case, and must have been pending for a considerable time prior thereto. He voluntarily submitted himself to the jurisdiction of that court and permitted the administration to proceed, without a suggestion that it was not the proper county, and took and perfected an appeal from that court to the district court. That his submission to the jurisdiction of the county court was not through mistake or inadvertence is shown by his affidavit for change of venue filed in the district court, wherein he alleges that he consulted his attorney with regard to asking for a change of venue, and had been advised not to make such application. The proceedings in the administration of an estate, particularly with reference to the probate of a will, and the determination of claims presented, are analogous to the trial of civil causes on questions of law and of fact, and we know of no reason why the uniform ruling of the supreme court and court of appeals of this state, that the place of trial, and the right to have a change is a privilege, and not a vested right, and may be waived, and, if a motion for change of venue is not made in apt time, the right, although mandatory, is waived, should not apply with equal or greater force.—*Fletcher v. Stowell*, 17 Colo., 94, 28 Pac., 326; *Forbes v. County Com. of Grand County*, 23 Colo., 344, 47 Pac., 388; *Burton v. Graham*, 36 Colo., 199, 84 Pac., 978; *Phoenix Indem. Co. v. Greger*, 39 Colo., 193, 88 Pac., 1066; *Kirby v. U. P. Ry. Co.*, 51 Colo., 509, 541, *et seq.*, 119 Pac., 1042, Ann. Cas., 1913B, 461; *Smith v. People*, 2 Colo. App., 99, 29 Pac., 924; *Pearse v. Bordeleau*, 3 Colo. App., 351, 33 Pac., 140; *Smith v. Morrill*, 12 Colo. App., 233, 241, 55 Pac., 824; *School Dist. v. Waters*, 20 Colo. App., 106, 77 Pac., 255. The question of jurisdiction of the county court, raised for the first time in the district court, even if it could be so raised in that court, was not made in apt time. It was not made until all the pleadings had been made up, the cause was ready for

trial, and the parties, witnesses and jurors in the court. The reason for holding that the question of jurisdiction of the county court upon matters such as are presented here may be waived, and if not presented in apt time will be so held, is much stronger in view of the importance and necessity of expedition in closing the administration of estates than in ordinary civil cases. This importance and necessity is recognized both by the courts and by express statutory injunction. It would be a reproach upon the law if persons contesting the administration of an estate, or contesting a will, could submit to the jurisdiction of the probate court for the length of time herein disclosed, and then successfully raise the question. Estoppel should apply if waiver were inapplicable. The motion on the ground of prejudice, or convenience of witnesses, was a matter within the discretion of the court. It does not appear that its discretion was abused.

II.

Counsel for appellant denies the right and authority of the trial judge to direct a verdict in a case involving the validity of a will. This point has been determined adversely to the contention of appellant in *Snodgrass v. Smith*, 42 Colo., 60, 62, 94 Pac., 312, 15 Ann. Cas., 548, in which our supreme court expressly ruled that the court has the same power in will contests to direct a verdict as in ordinary civil cases; and that, whether a court, in directing the jury to return the verdict, commits error is to be determined by the rules applicable in ordinary civil cases. See also, *In re Shell's Estate*, 28 Colo., 167, 63 Pac., 413, 53 L. R. A., 387, 89 Am. St. Rep., 181; *Butcher v. Butcher*, 21 Colo. App., 416, 122 Pac., 397; *In re Carey's Estate* (Sup.), 136 Pac., 1175. We discover no evidence in the record to support the allegations of the caveat that testator was not of sound and disposing mind when he executed his will, and there is no evidence whatever that

undue or any influence adverse to appellant was exerted over the testator by the persons named in the caveat, or any other person. That the will offered expressed the testator's mature wishes with reference to the final disposition of his property cannot be questioned by any disinterested person who reads the record. If the jury had returned a verdict adversely to the proponents of the will upon the evidence adduced, it would have been the duty of the trial judge, as stated in his remarks to the jury, to set the verdict aside. Therefore, in directing a verdict, the court not only exercised a right which it possessed, but a duty which it was under obligation to perform.

III.

The last contention made by appellant is that, upon its face, the will violates the rule against perpetuities, and is therefore against public policy and void. In the printed briefs, as well as upon oral argument, this question was urged as the most important of any, and decisive of the contest; but in our opinion the point raised, on which the offense against the rule is predicated, as applied to the will in this case, is highly technical—abstract and academic rather than substantial, because, whatever may be the decision upon that point, the will may be sustained. His contention is based upon the rule against perpetuities in force in this state, which prohibits the suspension of the fee to real estate, or of the vesting of title to personalty, for a longer period than that of designated lives in being at the time of the death of the testator, and twenty-one years and nine months thereafter; or, as the rule is sometimes expressed, “No interest is good unless it must vest, if at all, not later than twenty-one years and a fraction after some life in being at the creation of the interest.”—Gray on Rule Against Perpetuities, 201. The will, after providing for payment of the funeral expenses and debts, bequeathed the entire estate, by words of pres-

ent gift, to certain beneficiaries, to-wit: to testator's two sisters, \$800 each, if living at time of testator's death, otherwise to their children; to a faithful domestic, \$500; to one foster son, \$3,000, to another \$1,200; (as to last three named, to lapse if legatee not living at time of testator's death;) to a foster daughter, \$1,500, if living at testator's death, if not, to her children; to his son, the contestant, \$3,000, if living, if not, to his children and divorced wife, or the survivors of them; to each of the four sons of contestant, \$300; the residuary estate, if any, to go to the son, and foster sons, and daughter, in fixed proportions, etc., and directed the executors therein named to convert all property into money and make the distribution. The paragraph of the will which appellant insists is in violation of the rule is as follows:

"I hereby constitute William E. Weston and I. S. Smith of Fairplay, Colorado, and either of them, should the other be dead or refuse to act, executors of this will and trustees of my property; real and personal, and all right and credits, to whom, *on the admission of this will to probate*, the title and ownership of my said property rights and credits shall go, in trust, however, for the realization of said rights and credits and the conversion into money of said real estate and personal property according to their best ability and judgment under the supervision of the court of probate, and for the distribution of all the proceeds, after first paying my funeral expenses and my debts as above directed as well as all expenses of administration, including full compensation to my said executors as next hereinafter stated."

In *Chilcott v. Hart*, 23 Colo., 40, 45 Pac., 391, 35 L. R. A., 41, Mr. Justice Campbell discusses in a most scholarly manner the law, ancient and modern, pertaining to perpetuities, and the permissible construction of a will so as to give it force and effect when it consists of parts

that are valid and parts that are invalid, when construction is demanded for the purpose of overthrowing it.

As in that case, this is an action to overthrow the will. Counsel for appellant insists that the will is void because (a) of the clause in the paragraph quoted and italicized, to-wit, "to whom, *on the admission of this will to probate*, the title and ownership of my said property rights and credits shall go," etc., which he insists makes the time of the vesting of the estate in the executors as trustees indefinite, and (b) the vesting of the title of any legatee or beneficiary under the will is left to the uncontrolled judgment of the trustees. It is said that neither the vesting of the title primarily in the trustees, nor ultimately in the beneficiaries, *must* happen within twenty-one years and a fraction after some life or lives in being, and that the bare possibility that the estate may not vest within that time makes, not only the clause, but the entire will, void; in support of which appellant cites Gray on Perpetuities (2nd ed.), sec. 201; *Johnson v. Preston*, 226 Ill., 447, 80 N. E., 1001, 10 L. R. A. (N. S.), 564; *Tilden v. Green*, 130 N. Y., 29, 28 N. E., 880, 14 L. R. A., 33, 27 Am. St., 487, and other cases. The case of *Johnson v. Preston* is chiefly relied on because of the use of the words contained in the will there under discussion, to-wit:

"I give and devise to my executor hereinafter named, in trust, for the purpose and for the time hereinafter mentioned * * * my farm * * * to have and to hold for the space of twenty-five years *from and after the date of the probate of this will* * * * with no power of sale, conveyance or alienation of said land during said twenty-five years by said trustee * * *," and the holding of the court that because of the language quoted, the trust estate attempted to be vested in the executor offended the rule against perpetuities, and was therefore void. The striking similarity in the two phrases

“on the admission of this will to probate” and “from and after the date of the probate of this will” as used in the respective wills, and the respect which is paid to decisions of the supreme court of Illinois, gives its ruling great force and influence with this court, even though we are unable to agree with the conclusion of that court, that the words “from and after the probate of this will,” of themselves (if such was its conclusion), violated the rule against perpetuities to the destruction of the trust there attempted to be created. We think, however, that there is a marked distinction between the will in that case and the will in this, as a whole, that the similarity is more apparent than real, and that such distinction affects the allowable construction as to the estate or power attempted to be created in the trustees, and in determining when the trust estate would vest. In the Johnson case there was an express and unequivocal intention to take the property out of commerce by vesting the title in the trustee, *with no power of sale or alienation*, and to suspend the ultimate vesting of the fee in the beneficiaries for the full period named, and while the suspension of alienation had no effect on the time the title should vest in the trustee, it may affect the construction in ascertaining the intention of the testator and giving such intention its proper effect. That distinction was made in *Armstrong v. Barber*, 239 Ill., 389. By the will at bar, not only is there no tying up of the property, no suspension of the power of alienation or vesting of title except as produced by the words “on the admission of this will to probate,” but the trust attempted to be created is for the express purpose of effecting immediate realization on the credits, and conversion of all the other property, both real and personal, into cash, and the application of the proceeds, first to the payment of funeral expenses, debts, and cost of administration, and then distribution of the balance to the beneficiaries in the will.

The paramount rule in the construction of wills, to which all others must yield, is that the intention of the testator as expressed in the will must be ascertained and given effect if not prohibited by law.—*Bacon v. Nichols*, 47 Colo., 31, 105 Pac., 1082; *University v. Wilson*, 54 Colo., 510, 131 Pac., 422; *Armstrong v. Barber*, 239 Ill., 389, 394, 398, 88 N. E., 246; *Orr v. Yates*, 209 Ill., 222, 70 N. E., 731; *Chilcott v. Hart*, 23 Colo., 40, 45 Pac., 391, 35 L. R. A., 41; *Tilden v. Green*, 130 N. Y., 29, 28 N. E., 880, 14 L. R. A., 33, 27 Am. St. Rep., 487; *Johnson v. Preston*, *supra*. The intention of the testator is not to be determined by any single phrase, clause or section in the will, but from the entire instrument. When the will is read as a whole, it is evident beyond controversy that there was not in the mind of the testator any purpose of taking the property out of commerce, or suspending the vesting of title in the trustees, or its alienation, beyond the date when first under the laws of this state the executors, either in their capacity as statutory administrators of the will, or as trustees under that instrument, could take the property by virtue of the will's becoming effectual by probate. In sections of the will subsequent to that quoted, prompt and expeditious, indeed immediate, sale and conversion of the property into money, and distribution thereof to the beneficiaries, is enjoined upon the executors. The intention of the testator is clear. But it is said that the object of the rule against perpetuities is to defeat the intention of the testator. This we concede, if the intention of the testator was to violate the rule; not otherwise. It is also true that the object of the rule is to defeat any portion of the will the effect of which would be to violate the rule, whatever may have been the intention of the testator. We think the words in that section of the will quoted and the meaning thereof should be read and construed in connection with the statute of wills, and when so read, the intention and

meaning is plain and its effect lawful. Sec. 7081, Rev. Stats. 1908, 7879 Mills' Ann. Stats., provides that all instruments purporting to be original wills, upon presentation for probate, shall be recorded by the clerk of the county court in a well-bound book, and that upon admission of such will to probate such record shall be sufficient. Sec. 7088, Rev. Stats. 1908, 7886 Mills' Ann. Stats., provides for proof of the will, and that "every will *when thus proven* and recorded by the clerk of the county court in a book to be provided by him for that purpose *shall be good, and available* in law for the *granting, conveying and assuring the lands, tenements and hereditaments, annuities, rents, goods and chattels therein and thereby given, granted, devised and bequeathed.*"

The words of the will that "on the admission of this will to probate, the title and ownership of my said property rights and credits *shall go*" to the trustee, have no other or different meaning than the language of the statute last quoted, in substance, that upon the admission of the will to probate and record, it shall be good, and available in law for the granting, conveying and assuring the property thereby granted, devised and bequeathed. Read together, it is evident that the intention of the testator was to conform to the provisions of this statute. If the will violates the rule against perpetuities, it does so by making the precise provision that the statute makes for every will. Under no circumstances or wording of the will could the estate vest in the trustee before the admission of the will to probate.—*New York Life Ins. Co. v. Brown*, 32 Colo., 365, 376, 76 Pac., 799.

Moreover, under said statutes and others mandatory in terms, requiring the presentation of wills for probate within ten days (sec. 7800, Mills' Ann. Stats.), and the commencement by the executors of proceedings to cause such will to be proven within thirty days (sec. 7900, Mills' Ann. Stats.) "enforced by the sanction of compulsion,"

subject to fines and penalties, we think that, in construing this will, the presumption should obtain that if valid the will will be admitted to probate in a reasonable time, and well within the period of some life in being and twenty-one years thereafter, or within twenty-one years, where, as in this case, there is no precedent life estate, and that such presumption should be so conclusive that the bare possibility that it would never be presented, or, if presented and valid, would not be admitted to probate within twenty-one years, should not be regarded in this state as violating the rule against perpetuities.

We are reluctant, to the point of unwillingness, to follow *Johnson v. Preston, supra*, as a precedent, if the effect of adopting the construction there given would be to defeat the will now under consideration *in toto*; but if we concede that the words "to whom, on the admission of this will to probate, the title and ownership of my said property rights and credits shall go in trust" offends the rule against perpetuities, and defeats the trust estate attempted by said clause to be vested in the trustees, nevertheless, we think a *valid power in trust* to sell, convert and distribute was created, and the will as a whole may be sustained with the offending phrase, clause or provision eliminated or disregarded, and that it may be stricken out. The general rule is that where certain items in a will are valid and others are invalid, unless the valid portions are so inseparably connected with the other parts of the will that if stricken therefrom the general scheme of the testator will be defeated, the will as a whole should not be considered void.—*Chilcott v. Hart, supra*; *Tilden v. Green, supra*; *Johnson v. Preston, supra*; *Henderson v. Henderson*, 113 N. Y., 1, 20 N. E., 814. In *Tilden v. Green*, the principle has been thus expressed:

"If several trusts are created by will which are independent of each other, and each complete in itself,

some of which are lawful and others unlawful, and which may be separated from each other, the illegal parts, although void, may be cut off and the legal ones permitted to stand."

In *Chilcott v. Hart*, *supra*, at page 50, it was said:

"If, however, we should agree with appellants that each one of these items is incapable of enforcement, and therefore void for uncertainty, we are clearly of the opinion that all of them might be stricken from the will without impairing its integrity as a whole, or without affecting the general scheme of the testamentary disposition, or interfering with or defeating the evident general intent of the testator.—2 Schouler, part 6, chap. 1."

Keeping in mind these general rules, an examination of this will discloses that the primary object of the testator was that all his property of every kind and character should be converted into cash immediately after his death, or as soon thereafter as the property could be sold without undue sacrifice, and without the delay or expense incident to sales under the usual processes required by the statute in intestate estates, and that the proceeds of such sale should be paid to the several beneficiaries named in the will, to each of whom, including the contestant, he made a bequest of a fixed amount, by words of *present gift*; with such object in view, he gave his executors full power to sell said property to the best of their ability and judgment, without the interposition of the court, and, as incidental and subordinate to the power to sell, attempted to vest the title in such executors ~~as~~ trustees, provision being made for the residuary estate ~~if~~ there should be an excess, and for ratable diminution ~~if~~ there should be an insufficiency to meet the specific ~~legacies~~.

We conclude that the intention of the testator was ~~to~~ vest in his executors a power to sell or otherwise convert the property into money, make payment of debts

and expenses, and distribute the balance among the beneficiaries of the will, and that the provision that the title should vest in the trustees was subordinate to the paramount purpose. Holding that view, we also hold that the provision attempting to expressly vest the title in trust may be considered void, stricken out or disregarded, without changing either the effect of the will or the general testamentary scheme; object and purpose of the testator, and the power in trust may be sustained, although the other part should fall. "If the trust itself failed, but a valid power in trust was created, it may be executed."—*Tilden v. Green, supra* (page 50). It was not necessary that the testator should by express language vest the title in the executors in order to effectuate the execution of the trust power. If the power to sell was effectual, the title, so far as was necessary to effect that purpose, vested by operation of law.—2 Woerner on Administration, 716, 718, 719; 1 Jarman on Wills, 261, 262; *Ebey v. Adams*, 135 Ill., 80, 25 N. E., 1013.

In the case of *Johnson v. Preston*, relied upon by appellant to avoid this will, the court, after holding the trust estate void, and striking from the will or disregarding all portions thereof containing the void trust clause, nevertheless gave the will full effect, saying:

"If the trust should be upheld and given effect, the ultimate result would not be different from what it would be with the trust eliminated."

The same may be said in this case. It cannot be said that the interests of the beneficiaries are so interdependent with or upon the estate attempted to be given to the trustees that if their devise in trust fails it must pull the estate of the beneficiaries down with it.

IV.

Neither under the trust nor under the power is the vesting of title in the beneficiaries left to the uncontrolled

discretion of the executors. The discretion vested in the trustees by the Tilden will, denounced as void in *Tilden v. Green, supra*, substituted for the will of the testator the will of the donees of the power. We have shown that no such discretion was given by the Miller will.

Other assignments of error have not been overlooked. The judgment will be affirmed.

Decided April 14, A. D. 1913. Judgment affirmed on rehearing February 11, A. D. 1914.

[No. 3704.]

FAGAN V. TROUTMAN ET AL.

1. **TRUSTS—Resulting Trust—Evidence.** A resulting trust in lands will not be declared, except upon evidence which is clear, positive and convincing, or, as some courts declare, excluding all reasonable doubt.

The evidence examined and declared too indefinite and unsatisfactory to establish the trust.

2. — **Conveyance Between Husband and Wife.** Where the husband pays the purchase money on lands and takes a conveyance to the wife, it is presumed that a gift was intended; whereas, if the purchase money is paid by the wife, and the title conveyed to the husband, a resulting trust is presumed.

3. **APPEALS—What May Be Assigned for Error.** The exclusion of a competent witness offered to establish material matter is error, even though another witness testifies to the same matter. It will not be assumed that the witness excluded would have merely corroborated the one examined. It might well be that he would have remembered some things which had escaped the memory of the other.

4. — **Harmless Error.** An erroneous view of the law in the court below, in no manner operating to the prejudice of the appellant, will not reverse.

5. **EVIDENCE—Witness—Competency.** Under the act of April 3rd, 1907 (Laws 1907, c. 231, Rev. Stat., sec. 7267, par. sixth), a married woman residing with her husband, in the house of her stepfather, by his request, nothing more being shown as to their relations, is not a member of his family, and is not competent to testify as to a conversation between the stepfather and another, in an action in which she seeks to

establish as against the heirs at law of the stepfather, a resulting trust in lands of which the stepfather died seized in fee.

The statute qualifies only those living with the deceased, who, upon his demise, would inherit from him.

6. WORDS AND PHRASES—*Family*, in its broadest sense, includes those who descend from a common progenitor; in a less comprehensive sense, those living together as one household, under one head; in a still more limited sense, only parents and their children. In a statute not prescribing the sense in which the word is used, it is to be interpreted according to the context and the subject matter.

Appeal from Denver District Court. HON. CARLTON M. BLISS, Judge.

MR. JOHN R. SMITH, MR. H. B. WOODS, for appellant.

MR. EDWIN H. PARK, for appellees.

On Rehearing.

HURLBUT, J., rendered the opinion of the court.

This suit was instituted May 19, 1909. Appellees (plaintiffs below) allege in their complaint, in substance, that they are the sole heirs at law of James Davenport, who died intestate about April 8, 1909, and as such heirs are the owners and entitled to the possession of lot 22, block 186, Stiles' Addition to the City of Denver, said Davenport dying intestate and being at the time of his death the record owner in fee of said premises; that on or about April 6, 1909, defendant (appellant) wrongfully took possession of the premises, and wrongfully withholds the same from the possession of plaintiffs.

Answer, including cross-complaint, was filed, admitting the death of James Davenport, and that the legal title to said premises was in him at the time of his death, but denying the other allegations of the complaint. In the cross-complaint it is alleged that at the time of the death of said Davenport he held the premises in trust for defendant; that Davenport married defendant's

mother, Ella Kaseby, October 8, 1891, at which time defendant was three years of age; that her mother died intestate in Denver, October 3, 1901, leaving, as her sole heirs, defendant and James Davenport, (her husband); that on and prior to December, 1894, the mother had saved up and had, as her own money, upwards of \$700, which she had earned by and through her personal labor; that Davenport used said sum in the purchase of the undivided one-half interest in said premises, taking the title in his own name, but in trust for defendant's mother; and that during his lifetime Davenport recognized the title and interest aforesaid of the mother in and to the premises. A supplemental answer was thereafter filed, alleging that since the commencement of the action defendant had acquired the interest of plaintiff Thomas Russell in the premises, which the evidence showed to be an undivided one-thirtieth. Issues were joined by replication. Judgment was rendered in favor of appellees (excepting Thomas Russell) adjudging them to be the owners of the property, and entitled to the possession thereof, Thomas Russell's interest being adjudged to be in defendant.

The record is short, contains but little testimony, and is practically undisputed. In order to recover upon the issues in this case, defendant must have established at the trial, a resulting trust in the property in issue. In other words, the proofs must show that the money of defendant's mother was used by Davenport in the purchase of the said real estate, the title to which he took in his own name, and how much of said money was so invested. Under the pleadings here, if the evidence clearly and satisfactorily shows that any sum of money belonging to the separate estate of the wife was used by Davenport in the purchase of this property, and the amount thereof, or the proportion which it bore to the entire purchase price, the law would fasten a resulting

trust thereon as the equitable result of such investment, to the extent of the interest established by the trust. As to such evidence the following is an epitome of all there is upon those issues, *viz.*:

Deposition of J. W. Barnett:

“Mrs. Davenport showed me a check for \$500 which they (she and her husband) owned together. * * * Mrs. Davenport was a hard working, saving woman; she was a laundress and worked out by the day and gave it to Mr. Davenport to pay on the property and support the family.”

This deposition was taken in Missouri about nineteen years after the marriage of Davenport and the mother. Deponent states that he lived with them for four months after the marriage, but fails to state when this was. The deposition states that while he lived with the Davenports the mother showed him a \$500 check which she and her husband owned together, but does not pretend to state that any part thereof went into the property; nor how much of the \$500 each one owned; nor how he obtained his knowledge that the mother worked out by the day and gave her earnings to Davenport to pay on the home. His entire evidence in this behalf has the appearance of being hearsay.

Deposition of Pat Ming:

“During our conversation he (Mr. Davenport) told me that when he married Ella Barnett he was in debt and she gave him money, that she had previous to her marriage, to help him out of debt for their home.”

This deponent met Davenport in Missouri sixteen years before the deposition was taken. He states he knows nothing about the purchase of real estate by either Davenport or his wife. He was detailing a conversation which had taken place about sixteen years before, and the alleged statements thereof are flatly contradicted by the record, which conclusively shows that Davenport was

not in debt at the time of the marriage; that he had bought and paid for an undivided one-half of the home property two years before the marriage, and did not invest a dollar in purchasing the remaining half until more than three years after the marriage, at which time he bid that interest in at a foreclosure sale for money he had loaned thereon. So this evidence should be wholly disregarded.

Mahala Ming testified:

“Mrs. Davenport was my sister. They purchased and owned their home in Denver, Colorado. They both saved money from their work, and my sister took from Kirkwood, Mo., when they were married about \$500, which was put into the home. My sister, Mrs. Davenport, went to Denver in 1891 from Kirkwood, Mo., taking with her \$500. She married Mr. Davenport shortly after and helped him to pay their home out of debt, which Mr. Davenport had bought before their marriage. Mrs. Davenport was a hard working, saving woman. She saved her money and improved the home, and helped pay it out of debt.”

This evidence is necessarily pure hearsay, except as to the \$500 which deponent says was taken by her sister Mrs. Davenport, from Kirkwood. The deposition clearly indicates that she was never in Colorado but once, *viz.*, in 1901 during the six weeks of her sister's last illness. With the exception noted, it is clear that this witness had no personal knowledge whatever of a single issuable fact testified to by her. She does not pretend to state that Davenport ever spoke to her concerning such matters.

All of these depositions are by witnesses who were relatives of appellant, and who no doubt gave their testimony as favorably for her as their consciences would warrant.

Testimony of Anthony Dyer:

“We (Mr. Davenport and witness) were talking about Mrs. Davenport, and I asked him if Nellie didn’t come in for her mother’s share of the property, and he said yes; that her mother helped him make the money to get the property with, and he certainly would see that she would have it, * * * if it was not for Nellie and her mother he wouldn’t be able to hold the property.”

If Davenport made the statement attributed to him by this witness, then it is clear that he considered the entire home property as his own, and intended at some future time, by deed or will, to transfer the same to appellant. If Davenport had taken the mother’s money and put it in the property, agreeing and promising to hold it in trust for her, and that it was to be hers, as pleaded in the cross-bill, then it is reasonable to suppose that he would not have made such statements.

Walter C. Scruggs testified:

“He (Davenport) told me his wife was going ahead with the property and keeping up the payments, for he wasn’t making a dollar, and ‘her mother worked hard and has put more money in this place than I have.’ That was about a month before he died. * * * Just about a year * * * about six months before he died * * * I was talking with him again about his property * * * I asked him ‘How much you got now?’ ‘Well,’ he says, ‘\$1,500 in the bank,’ and he says the most of that was his wife’s money that she had made before she taken sick and died, washing and ironing.”

This evidence warrants a strong presumption that the mother put no money into the home property, but on the contrary, whatever money she earned, as well as the \$500 brought by her from Missouri, represented the greater part of the certificates of deposit amounting to \$1,500.

It must not be overlooked that the distinguished

judge who tried the case below without a jury found the issues against appellant. As we read the record it so strongly supports the findings and decree that nothing short of an arbitrary refusal to follow the decisions of our supreme court, as well as of this court, would warrant us in disturbing the decree.

William Barnett testified that at the time he and Davenport bought the property they borrowed money from one Reed to make part payment thereon; that they paid Reed's note within two years from the time they bought the property, *viz.*, 1887; and that he afterwards borrowed some money of Davenport, upon the property, in 1891.

Upon this evidence, what amount of money could the trial court say was paid by the mother upon the purchase price of the property, or what amount she invested therein, and when? True, the witness Ming states that the mother took about \$500 from Kirkwood, Mo., when she married, and that it was put into the home, but there is no evidence to show at what particular time *any* money was paid on the home, what specific amount, and where or to whom the same was paid. No circumstances whatever are shown attending the payment of any money by the mother to Davenport, either for the purpose of being applied upon the purchase price, or as a loan on the property. While the trial court found that the mother may have furnished some money towards the purchase price, it suggested that it was a "guess" as to how much. The evidence wholly fails to sustain the allegations of the cross-complaint, which aver, (a) that prior to December, 1894, the mother accumulated about \$700; (b) that Davenport used the same in the purchase of the one-half interest in the property; and (c) that he agreed and promised at the time of such purchase that such interest should be the property of the mother, or that he held the title in trust for her.

The record shows that on November 16, 1891, and shortly after the marriage of deceased and defendant's mother, deceased loaned Barnett \$600, and took a trust deed to secure payment thereof on Barnett's undivided one-half interest in the property; that afterwards, on November 28, 1894, this trust deed was foreclosed, and trustee's deed conveyed Barnett's interest in the property to deceased, from which time to the time of his death he was the record owner in fee of *all* the premises, having acquired the other half interest about two years prior to the marriage. There is no evidence that the mother contributed any money to the purchase of this property prior to her marriage. In none of the transactions concerning the loan of \$600 after the marriage is there a word of testimony showing that the mother had anything to do with it, or that she was in any way mentioned concerning the same; nor is there any testimony tending to show any agreement between Davenport and the mother, or any conversation by or between them, respecting any money paid by the mother upon such loan. In fact the record fails to show anywhere that the mother ever paid one dollar at any time or place, or under any circumstances, which was applied, or to be applied, upon the purchase price of Barnett's interest, or contributed as part of the \$600 loan. The only evidence disclosed by the record tending to show such payment or contribution is that Davenport during his lifetime had said the mother gave him money after the marriage to help him out of debt, and that she put more money into the property than he did. These statements attributed to Davenport, however, appear to be discredited by his other statements in the record. No witness pretends to say that *at the time the trust deed or trustee's deed was executed and delivered*, the mother paid or contributed one cent toward the purchase price or the loan. One witness testified that he had known Davenport since 1882; that he never knew

him to be without money—the amount he could not state; that he had seen him with as much as \$1,000; that from 1887 to 1891 he had some certificates of deposit, but could not tell the amounts; and that Davenport kept these certificates at witness's house. The evidence above quoted (which is practically all there is upon the subject) tends to show that defendant's mother had, at the time of her marriage with deceased, something like \$500 in money, but, as above stated, there seems to be wanting any kind of evidence or testimony showing that she paid any specific sum of money to deceased at any stated time or place, or in what manner she paid the same, whether in money or by check, or under what circumstances. We presume this fact became, in the mind of the trial judge, an insurmountable obstacle to decreeing an equitable lien or resulting trust in the premises in favor of defendant.

It is well settled in law that a valid, recorded deed, conveying real property to the grantee, imports a good title to the premises in such grantee, and all jurisdictions are practically unanimous in holding that a resulting trust in real property will not be declared to exist unless the evidence in support thereof is clear, positive, satisfying and convincing; indeed, as some courts say, it must be beyond a reasonable doubt, and conclusive. Here the title was of record by warranty deed in James Davenport, and nothing short of the character of proof stated would warrant a decree fastening a resulting trust in behalf of defendant upon any part or portion of the premises. Of the many cases we have examined, we fail to find one even intimating that evidence of the character and quality disclosed by this record is sufficient to establish a resulting trust against real property. That the proof must be of such character and sufficiency as above stated, to establish a resulting trust, is supported by an overwhelming weight of authority. None of appellant's authorities are in conflict with the rule stated, but many of them spe-

cifically announce and follow the same. The following authorities constitute a partial list supporting the rule, viz.: *Whitsett v. Kershow et al.*, 4 Colo., 419; *Lundy v. Hanson*, 16 Colo., 267, 26 Pac., 816; *McClure, etc., v. La Plata County*, 19 Colo., 122, 34 Pac., 763; *Nesmith v. Martin*, 32 Colo., 77, 75 Pac., 590; *Doll v. Gifford*, 13 Colo. App., 67, 56 Pac., 676; *Freeman v. Peterson*, 45 Colo., 102, 100 Pac., 600; *Reed et al. v. Reed et al.*, 135 Ill., 482, 25 N. E., 1095; *Olcott v. Bynum et al.*, 17 Wall., 44, 21 L. Ed., 570; *Wells et al. v. Messenger et al.*, 249 Ill., 72, 94 N. E., 87; *Woodside et al. v. Hewel*, 109 Cal., 481, 42 Pac., 152. The case last cited is well reasoned, persuasive and forceful, and holds to the rule, under facts and circumstances, purposes of action, and relief sought, nearly identical with those of the case at bar.

In those authorities cited by appellant, holding that a resulting trust had been established, we observe that they all show that the one who created the trust either paid, or caused to be paid, the consideration for the conveyance, or surrendered property, or valuable interests, for that purpose, and that such payments, etc., were established by clear and positive evidence showing the amounts, dates, places and circumstances thereof; that is to say, that, if no evidence had been given by the party denying the trust, the court had ample, convincing evidence before it upon which to render a decree establishing the trust. In the instant case there is practically no dispute of defendant's testimony. The weakness occurs in the uncertain, unsatisfying and doubtful character of the evidence relied upon by her to establish the trust.

The trust sought to be established by defendant is what is known in law as a resulting trust. Many definitions of this character of trust may be found in the books. The following is taken from Bouvier's Law Dictionary (Rawles' revision), vol. 2, p. 914, viz.:

“Resulting Trust. A trust raised by implication or construction of law, and presumed to exist from the supposed intention of the parties and the nature of the transaction. * * *

“A resulting trust must arise at the time the title is taken. No subsequent oral agreement or payment will create it.”

In *First National Bank of Denver v. Campbell*, 2 Colo. App., 271, 30 Pac., 357, the court, speaking of resulting trusts, says:

“One thoroughly recognized limitation is, “that the trust must result, if at all, at the instant the deed is taken, and the legal title vests in the grantees. No oral agreements and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself.” A like limitation is to be found in the character of the proof requisite to the establishment of the trust. Courts are very exacting in the requirement of unquestionable evidence to establish a resulting trust. Whatever is essential to exhibit the equity of the *cestui que* trust must appear in a clear and unclouded light. * * * There was no attempt to show what amount of money was advanced to Johnson at the date of the commencement of the discovery work, what was given him from that time to the filing of the certificate of location, or the completion of the title by the finding of mineral, nor what were the disbursements incident to these things. It is thus impossible by inference, or arguments, to find the necessary proof as to the application of the intervenor’s money to the procurement of the title.”—*Smith v. Turley*, 32 W. Va., 14, 9 S. E., 46; *Warner v. Bowdoin Square Baptist Soc.*, 148 Mass., 400, 19 N. E., 403; *Ducie v. Ford*, 138 U. S., 587, 11 Sup. Ct., 417, 34 L. Ed., 1091; *Knox et al. v. McFarran*, 4 Colo., 596.

In addition to appellant’s contention already noticed,

there are two others which she relied on for reversal, *viz.*: (a) Alleged error in the construction of the law by the lower court, concerning deeds of real property between husband and wife, where the consideration is not paid by the one taking title; (b) refusal of the court to allow defendant to testify as to a conversation between her husband and deceased, which took place the day after defendant's marriage.

As to the first ground, appellant's position is supported by the great weight of authority. Her contention is to the effect that when a husband pays the purchase money and takes a conveyance in the name of his wife the presumption arises that he intended it as a gift, and there is no presumption of a trust in such case; while on the other hand, if the conveyance be taken in the name of the husband, the purchase money being paid by the wife, no presumption of an intention to make a gift arises, but the presumption of a resulting trust in favor of the wife at once arises, and the husband will be deemed to be a trustee of the property thus acquired, for her benefit, unless he is able to overcome such presumption by establishing a different intention. The court below assumed, and maintained throughout the trial, the position that the rule applied to husband and wife equally; in other words, that if the conveyance of the property be taken to the husband, which was paid for by the wife, the law raises the presumption that she intended the same to be a gift. This was an erroneous view of the law entertained by the court, but we are unable to see wherein appellant was prejudiced thereby. Had the court ruled correctly on the question, it would still have been necessary for appellant to prove at the trial the facts constituting a resulting trust, as pleaded in her answer. As we read the record, no evidence offered by defendant was excluded by reason of the court's views on this question. On the contrary, the record manifests a decided liberality on the part of

the court in admitting evidence favorable to defendant. This can be accounted for in view of the court's expressed sympathy for defendant. As to the rule recognizing the distinction in conveyances between husband and wife, the following authorities are in point and appear to support such distinction beyond controversy, *viz.*: *Doll v. Gifford, supra*; *Kline, Adm'r, v. Ragland*, 47 Ark., 111, 14 S. W., 474; *Wright v. Wright*, 242 Ill., 71, 89 N. E., 789, 26 L. R. A. (N. S.), 161; *Heath v. Slocum*, 115 Pa., 549, 9 Atl., 259.

The remaining question for consideration pertains to the ruling of the lower court in refusing to allow defendant to testify as to a conversation between her husband and deceased concerning the matters in issue, on the day succeeding her marriage. It would appear from the record that the court held defendant to be disqualified under the act of 1907, page 629, Session Laws of that year, which reads in part as follows:

“In any such action, suit or proceeding, any adverse party or parties in interest may testify as to any conversation or admission, or as to all matters and things connected with the subject-matter of said action, suit or proceeding, and which conversation and admission and matters and things aforesaid, occurred before the death and in the presence of such deceased person and also in the presence of any member of the family of such deceased person over the age of sixteen years, or in the presence of any heir, legatee or devisee of such deceased person over the age of sixteen years; provided, however, that such member of the family, heir, legatee or devisee, as the case may be, is present at the hearing of said action, suit or proceeding, or whose testimony is or may be procurable at such trial.”

Appellant contends that under the act she was qualified to testify, claiming that the evidence sought to be elicited pertained to a conversation between her husband

and deceased in her presence, that she was an adverse party in interest, that the conversation related to matters and things connected with the subject-matter of the action, and that at the time of the conversation she was a *member of the family* of said deceased, over the age of sixteen years. The question here raised is an important issue on this appeal. The evidence shows that from September 30, 1907, to April 8, 1908, defendant, her husband, and deceased lived together harmoniously, in the house in controversy, and defendant took care of the house and did the work; also that defendant and her husband occupied deceased's house with him, upon his urgent invitation. There is no evidence as to any definite agreement between these three parties concerning their joint occupation of the premises. The evidence, taken as a whole, rather tends to show that they were living together in pleasant family relations, without any definite contract between them concerning the household expenses and occupancy of the home. Under this state of the record it becomes necessary to construe the phrase, "in the presence of any member of the family of such deceased person," found in the act. If defendant was not a member of the family within the intent thereof, then the court's ruling was right; otherwise not. It is true the husband testified as to the conversation between himself and deceased concerning a number of matters, but nothing was testified to concerning the real property in issue; on the other hand, defendant was interrogated specifically as to the same. It is suggested by appellees that if the court erred in excluding defendant as a witness, it is error without prejudice, as the conversation had already been testified to by the husband, and her testimony would be merely cumulative. We cannot adopt this reasoning. If a competent witness, defendant could have testified to the entire conversation. It cannot be presumed that she would have simply corroborated the

testimony given by her husband. He may have omitted in his testimony a substantial part of the conversation, which defendant, if a competent witness, could and probably would have supplied, had she been allowed to testify.

The construction of the statute, respecting the intent and meaning of the legislature in the use here of the word "family" appears to be necessary. Innumerable courts and text writers have judicially defined this word, but no decision can be found which attempts to give it a fixed, definite and invariable meaning when used in statutes. It seems to be generally conceded that it has several meanings. Its broadest one includes all those who are descended from one common progenitor—thus of the same blood. In a less comprehensive sense it means a collective body of persons living together and constituting one household under one head. In a still more limited sense it means father, mother and children. It is also defined as follows: "Family, at law, is a collective body of persons who live in one home, under one head or manager." 3 Words & Phrases, p. 2673. It has also received countless interpretations as found in statutes concerning homestead exemptions, and exemption of personal earnings of the head of a family, etc.; likewise when found in wills and codicils. Its meaning has been often adjudicated when found in statutes concerning widows' allowances, etc. It seems to be generally held that in the absence of a statute specifically defining its meaning its purport and effect are to be determined by the context of the statute and consideration of the subject-matter to which it refers. One court, in *Roco v. Green*, 1 Tex., 438, has laid down the following rule:

"We deduce from the authorities the following general rules to determine when the relation of a family, as contemplated by law, exists:

"1. It is one of social status, not of mere contract.

“2. Legal or moral obligations on the head to support the other members.

“3. Corresponding state of dependence on the part of the other members for this support.”

However, that case was founded upon a construction of a section of the Texas state constitution which reserved from forced sale certain designated property, which, by the act, withdrew the same from the estate of a deceased person “in case a constituent of the family survived.” It was there held that a married daughter with her children, residing with her mother, was not a constituent member of the family, such as entitled her and her children to the homestead upon the death of the mother. Many cases are cited by counsel in their briefs for the purpose of supporting their views respectively upon this question, but our attention has been called to none which are in point, or which are of much assistance in determining the question.

It will be noticed that our statute of 1907, above quoted, was merely an addition to the law then existing. As the law existed at the time of its enactment, defendant would not have been a competent witness for any purpose in this case. Under the statute of 1907, is the defendant a competent witness under the facts here shown? We think not. A reasonable inference, as to the purpose of the legislature in enacting the statute mentioned, would be, that in this class of actions all evidence pertinent to the issues ought to be admitted when such rule would work no injury or prejudice to the estate, or to any party or person interested as heirs or beneficiaries in the result of the proceedings. It is probable that in this kind of an action any conversation concerning the subject-matter of litigation, had, between deceased and a third party, in the presence of an heir, legatee or devisee of the deceased, or in the presence of a member of his family, would not result in injury to the estate, because, in theory at least,

the interests of deceased's family, his legatees, heirs and devisees, would naturally lie with the administrator or executor, and their evidence would be available to assist in determining the truth or falsity of the facts detailed by such conversation. The common-law authorities generally concede that there is no duty imposed on a husband or wife to provide for, support or maintain, step-children. Still, it is generally held that if such children are taken into the family as constituent members thereof, and treated and fostered as children of the whole blood, they will be considered members of the family and entitled to such support. In such case, however, the rule is not to be interpreted as extending the right of inheritance to those entitled to such support. The following cases involve an interpretation of the word "family" as used in divers statutes, viz.: *Town of Manchester v. Town of Rupert*, 6 Vt., 291; *Menefee v. Chesley*, 98 Iowa, 55, 66 N. W., 1038; *McMahill v. Estate of McMahon*, 113 Ill., 461; *Smith v. Wildman*, 37 Conn., 384; *Bowne v. Witt*, 19 Wend. (N. Y.), 475. These cases are instructive as showing the different views entertained by the various courts in construing the meaning of the word "family" when used in statutes.

Our conclusions are that as to the competency of the defendant as a witness, the statute relied on must be considered in connection with, and controlled by, the statutes of descent and distribution, rather than the meaning of the word "family" as deduced from any other statute; and that the words "member of the family" of such deceased, in the sense here used, include only such persons living with the deceased, as would inherit from him by the laws of descent. Others, such as heirs, legatees and devisees, who do not live with deceased so as to constitute members of his family, are specially mentioned in the statute. The court, therefore, did not err in excluding defendant as a witness.

We do not think the record discloses sufficient proof to warrant a decree fastening a resulting trust upon the property; nor was the proof sufficient to warrant a decree for an equitable lien in favor of defendant.

In view of the able dissenting opinion written by our brother, Bell, we feel impelled to add a word to what has already been said.

The court does not seem to be divided on any legal or equitable principle involved in the majority opinion, but the disagreement arises from an analysis of the testimony and the force and effect to be given thereto. True, the record shows that appellant, as well as her mother and step-father (Davenport) were poor but industrious colored people; but it shows with equal clearness that appellees were also respectable and poor colored people; in addition to which it discloses that appellees were the heirs at law of Davenport under the statutes of descent of this state. The legislature, as the supreme law-making power of the state, might have conferred right of inheritance upon step-children, but it has not done so. The courts do not question the wisdom of laws enacted by the people's representatives, but they look only to the enforcement of the laws as they find them.

The minority opinion invokes the maxim "There is no wrong without a remedy." The converse is also true, as illustrated in this case. The remedy sought fails, because in a legal sense there was no wrong suffered or shown. We would suggest that the maxim "*Damnum absque injuria*" is recognized and observed in every court where the common law is practiced, and under its observance untold injuries of a moral or civil nature are suffered in individual cases, for which there is no redress. The maxim can be illustrated. Suppose the mother, prior to her death, had been the record owner of this property and had deeded or devised the same to her

husband, thereby disinheriting her own flesh and blood. No doubt this would be considered a moral wrong; indeed it would have worked practically the same moral wrong against which Judge Bell so eloquently inveighs; but who can say that any known law, or rule of equity, could be invoked in such a case to deprive Davenport and his lawful heirs of the interest so conveyed? In other words, the distinction between the views, as expressed by the minority opinion and the majority opinion, comes to this: The majority opinion recognizes the statutes of descent and distribution and the unbroken line of decisions of the highest court of this state as controlling until set aside by the legislative branch of the state government; while the minority view is that when said statutes and decisions seem to conflict with the personal view of an inferior court concerning moral questions they have no binding force.

The evidence here well justifies a presumption that Davenport intended his step-daughter to have the \$1,500 in interest-bearing bank certificates which he had turned over to her, and which she possessed at the time of his death; but that he desired the real property to go to his lawful heirs. While the evidence shows that on several occasions he stated he intended to give the real estate to the step-daughter, the fact remains that he never evinced any intention, by act or deed, to do so. He had ample opportunity to consummate his alleged intention, and even in his last sickness there were several days before death in which he could have transferred the property to appellant, either by will or deed.

It cannot be said that this court has in any way overlooked appellant's interests, for in a recent decision it has reversed a judgment brought here by her, in order that she might have the full benefit of a jury trial upon issues which involve her material property rights.

The former opinion is withdrawn, and the judgment will be affirmed.

Judgment Affirmed.

BELL, J., and MORGAN, J., dissent.

BELL, J., dissenting:

I have such implicit confidence in the integrity and sound judgment of my associates that it would be a struggle for me to dissent from their conclusion if I were not convinced that they, unwittingly, do a great injustice to the appellant, Nellie Fagan, through the misapplication of a technical rule of evidence to a state of facts, to which, I think, it was never intended to apply; and, further, my associates and the trial court, as I understand it, agree with me that the result of the judgment carries with it injustice, because of the supposed impotency of the court to invade what the majority think an impregnable line of court decisions and precedents, preventing them from doing what they should like to do, if legally possible.

October 8th, 1891, James Davenport, a hard working and saving colored hod-carrier, married Ella Kaseby, an equally hard working and saving colored laundress. The wife brought to the marriage a three-year-old daughter, now the appellant herein, and \$500 in cash, and immediately after the marriage, she took up her residence and vocation in the city of Denver, working out as a laundress by the day, saving her earnings, and intensely persisted in her efforts for almost ten successive years, or until October 3rd, 1901, when she died, leaving her husband, the said James Davenport, and her said daughter, then about 13 years of age, as her sole heirs at law. The daughter, immediately upon the death of her mother, assumed the duties as housekeeper for Davenport, and faithfully attended to them for almost eight years, or until about April 8th, 1909, when Davenport died, leaving her in the

possession of lot 22, block 186, Stiles' Addition to the City of Denver, with a little one-story brick house thereon, in which the family had lived ever since the marriage, and also left in her possession about \$1,500 in bank certificates. When Davenport was married, he owned an undivided one-half interest in the lot and house before mentioned, and a colored friend of his by the name of Barnett owned the other half thereof. These two poor colored men purchased this home on the 7th day of November, 1887, for a consideration mentioned in the deed of \$2,000, and gave, in part payment thereof, a trust deed for \$1,550, which was released November 9th, 1889, and there is evidence tending to show that they borrowed some money from a real estate man, but the amount and security, if any, given therefor is not made known. Davenport admitted to a friend of his, one of the witnesses, that he was in debt when he married, and that his wife let him have her money to pay for the home, and, notwithstanding this indebtedness and his meagre earnings, on November 16th, 1891, just a little more than one month after the marriage, he loaned Barnett \$600, which was secured by a trust deed on Barnett's interest in the property, and about two years afterwards he loaned him \$800 more, which was likewise secured. Doubtless, both of these loans were made as a means of buying Barnett's interest in the property, as the title thereto was obtained by Davenport through those avenues on the 28th day of November, 1894, when the first trust deed to him was foreclosed, and the property purchased by him for the amount due on said trust deed, and expenses, and a deed immediately executed to him, as at that time there was no equity of redemption in this state from such sales. There is not a particle of evidence showing that the wife had a dollar of the money she brought to the marriage or any of her earnings at the time of her death, except such as she was entitled to

claim as her interest in the property, or, possibly, the bank certificates before mentioned, and in support of such claim there is plenty of evidence to the effect that the money she had at the time of the marriage and her subsequent earnings were invested in the property.

Victor Scruggs, who worked with Davenport for a period of about eight years, testified that Davenport told him about four or five months after the marriage that "his wife was going ahead with the property and keeping up the payments, for he wasn't making a dollar; that was during the panic." He further testified that the panic lasted about a year and a half, and that when Davenport did work, he did not earn over a dollar and a half a day, and that, in a conversation he had with him after the wife died, Davenport "commenced crying about his wife, how hard she worked and helped to pay for the place, and now, he says, * * * 'I want Nellie to have this place when I die. * * * She has stayed here and *her mother worked hard and has put more money in the place than I have, and I want her to have this place when I die.*' "

Mr. Dwyer, a shoe man, and a particular friend and neighbor of the Davenports, testified that, shortly after the death of Davenport's wife, Davenport told him that "her (Nellie Fagan's) mother helped him make the money to get the property with and that he certainly would see that she (Nellie Fagan) would have it," and witness also testified that in a conversation with Davenport about two weeks before his death, Davenport told him that Nellie would get the property; "that she was entitled to it; that Nellie had worked hard since her mother died and helped him, and if it was not for Nellie and her mother he wouldn't be able to hold the property."

Mahala Ming testified that Davenport and his wife "had purchased and owned their own home in Denver,

Colorado. They had both saved money from their work and my sister (Mrs. Davenport) took from Kirkwood, Missouri, when they were married about five hundred dollars which was put into the home. * * * She was a hard working, saving woman. She saved her money and improved the home and helped pay it out of debt."

J. W. Barnett testified that the property was purchased by Davenport before the marriage, "and after the marriage Mrs. Davenport helped pay for it. * * * She was a hard working, saving woman. She was a laundress and worked out by the day and gave it to Mr. Davenport to pay on the property and support the family."

Pat Ming testified that "Davenport visited me in Kirkwood * * * he told me that when he married Ella Barnett (appellant's mother) he was in debt and she gave him money that she had previous to their marriage to help him out of debt for their home."

The foregoing with other evidence was introduced on behalf of the appellant, and the trial judge, in his announcement, said:

"This is a case that illustrates that hardships may arise under the law. If there ever was a case that appeals to a sense of moral justice, this one does, on behalf of the defendant here. I think that the evidence shows that this girl, at two or three years of age, was taken into this family, and that her mother brought somewhere about \$500, which went into the family funds. The mother worked for years at hard labor, and her earnings went, so far as the evidence in the case shows, in the same way, and the deceased got the benefit of it all, and it is an extremely harsh matter and a great moral injustice that this girl cannot recover what she should be entitled to at least; that is, the proportion of the estate that was created by her mother. It is impossible for the court to determine, from this evidence, just how much of these

funds or earnings went into the property. There is no evidence here of any definite amount having gone in out of the \$500. There is evidence here—plenty of it—to sustain the proposition that she had helped pay for this home. * * * There is evidence to show that some time prior to this—some time prior to her marriage—she had \$500. The evidence shows that a month after the marriage the deceased made this loan, which is the source of his title to an undivided one-half of the property, and if this \$500 could have been traced into this loan this court would have held that there was an equitable lien there, *provided there had also been an arrangement shown that would rebut the presumption of law that obtains in dealings between husband and wife that these matters are, in the absence of any showing to the contrary, assumed to be gifts, which is a well established principle of law.*” (Italics mine.)

If the courts are, in fact, as impotent as the criticisms of the learned trial judge would indicate, then the boasts of the chancellors throughout many generations, that “Equity will not suffer a wrong without a remedy,” have been but tinkling cymbals, and of no substantial benefit. However, I do not think that the court is as powerless as the learned trial judge concluded in this case. He, unfortunately, labored under an erroneous assumption in holding that it “*is well established principle of law*” that, in the absence of any showing to the contrary, the moneys or property of the wife received by the husband are assumed to be gifts. It is, rather, a well established principle of law that, if a husband, upon whom rests a legal obligation to supply his wife with a home and maintenance, being out of debt, turns over his money or property to her, he will be presumed to have made a gift thereof. However, if the wife, upon whom rests no such primary legal obligation, places her money in her husband’s hands, and he invests it in realty and takes the

title in his own name, the presumption prevails that a gift is not intended, but that he holds the title in trust for her.—*Wright v. Wright*, 242 Ill., 71, 89 N. E., 789, 26 L. R. A. (N. S.), 161; *Lloyd v. Woods*, 176 Pa., 63, 34 Atl., 926; *Kline v. Ragland*, 47 Ark., 111, 14 S. W., 474; *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal., 474, 111 Pac., 362, 363.

I think the trial judge also erred in holding that there is no evidence showing what amount, or when, any of the wife's money was invested in the property. Every necessary element of this case may be proven by circumstantial evidence, and, therefore, the trial court had a right to take into consideration the fact that Davenport was in debt when he married; that he was a hod-carrier working for low wages; that he was obliged to live out of his wages; and at times indulged in luxuries, such as intoxicating beverages; that the mother of the appellant brought to the marriage \$500 in cash, about thirty days before the \$600 loan was made; that, according to one of the witnesses at least, this \$500 together with Mrs. Davenport's subsequent earnings were invested in the property; that no other disposition of this money has been shown; that there is no evidence that any money was invested in the purchase of the property, except the \$600 and \$800 loans; that Davenport admitted during his lifetime that his wife helped to pay for the property, and had put more money into it than he did; that the property belonged to the appellant as much as it did to him during his lifetime; and that he intended that she should have the whole of it after his death, because of the unremitting toil of his wife and the appellant in assisting in securing and maintaining the home, and had requested the witness Scruggs to go with him to a lawyer at an early date to will the property to her, but was soon taken ill, and lived but a few days thereafter.

I think the above stated circumstances establish a

definite amount and time of investment on the part of the mother, and if, as stated by the witness Scruggs, she had put more money into the property than Davenport did, this is definite to the extent of one-half of their combined investment; that is, if the two paid for the entire premises, and Davenport acknowledged that his wife paid more than he did, then it is definite that she paid for at least one-half thereof. As to the amount invested by her above one-half, it is indefinite; but the fact that she cannot recover the indefinite sum above one-half should not militate against her right, or the right of her heir, to recover the definite sum established. It is and always has been the policy of the law to give every reasonable presumption in favor of justice. Where this court is not bound by some legislative enactment, or decision of a higher court of this state on a like statement of facts, its first duty is to determine what would be substantial justice, then make every endeavor to find some approved legal or equitable way by which justice may be done. It is a severe reflection upon the courts when a judge feels bound to say, as was done in this case, that the judgment he renders carries with it "*a great moral injustice.*" We think the judge underestimated his power, and misconceived his duty when he entered judgment for the appellees while admitting that in "justice and good morals" they were not entitled to the same. We are told, however, that in establishing a trust like the one involved here, the evidence must be almost beyond a reasonable doubt in favor of the trust. This extreme rule applies where the justice of the case is uncertain. Every general rule has its numerous exceptions. It has always been abhorrent to the chancellor to permit injustice to prevail. It was the inadequacy of the law to furnish a remedy for every injury that called the court of equity into existence. In the formative period the chancellors recognized no difference between a moral and

a legal injustice, but were guided in their decisions by their consciences, and not by what has since been aptly termed the civil or judicial conscience of the court, but by their own individual consciences, by their moral sense apprehending what is right and wrong, by their own conceptions of good faith.—1 Pomeroy's Equity, 3rd Ed., sec. 50.

In this manner the first precedents were made, and continued until they had attained a reasonable completeness with respect to fundamental principles and general rules. This accumulation became the store-house whence the chancellors obtained material for their decisions, and both guided and restrained their judicial action. Equity is ever expanding its doctrines so as to cover new facts and relations, and has a power of orderly expansion, which cannot be lost without destroying its very nature.—Pomeroy's Equity, *supra*, secs. 59-60. However, in the development of every judicial system, the people have been compelled from time to time to destroy, by legislative acts, the controlling powers of precedents before such orderly expansion could maintain its continuing growth.

The New York legislature in 1848 passed a most sweeping act termed "The Reformed American System of Procedure" with the avowed purpose of destroying the supremacy of a multitude of unjust precedents, and to adopt the general equity theory of parties, and to apply this system to the single civil action in all civil cases. The principles of this act became so popular that the legislatures of most of the states of the Union, and the British parliament soon adopted the same. Many leading lawyers and influential benches gave the acts a most narrow construction, and limited the intended liberal use of the principles.—Pomeroy's Code Remedies, 4th Ed., sec. 6. The legislative policy has been, and is, in the jurisdictions adopting the liberal procedure, that the court shall

see that justice is administered according to the liberalized reformed procedure. It should not, now, be possible for a court, upon facts similar to those contained in this record, to announce, as the trial court did at the conclusion of the evidence, that "a great moral injustice" is done to the appellant in his judgment then given against her. We have heard no denial from any of the judges that the well-worn finger prints of the mother of Nellie Fagan are indelibly imbedded in every fibre of this home secured after the marriage, and that the appellant is in "justice and good morals" entitled to at least one-half of the creation of her mother, but the majority of the court seem to apply the strict rules of resulting trusts, properly applicable where the rights and equities are uncertain. In this case we have heard no one express a doubt that the prevailing equities were upon the side of the appellant. It is difficult for us to see, in the light of the equity precedents, built up by a long line of distinguished chancellors, the great underlying principles of which are natural justice and the moral code, how a majority of this court can consistently affirm a judgment which was rendered with a contemporaneous confession that it was in violation of "moral justice" and that it was "an extremely harsh matter and a great moral injustice that this girl cannot recover what she should be entitled to."

There are cases wherein statutory prohibitions force judges to award or affirm what they believe to be "harsh and unjust" judgments, but in this case the judges are not only free from legislative prohibition, but the very spirit of the "Reformed American System of Procedure" adopted by our legislature demands that judgments shall be in harmony with, rather than in violation of, "moral justice." We know of no system which should uphold such judgments, since the technical rigors of the common law dominated the courts and the precedents created

thereunder. However, this is an equity case, and we understand that, by force of the equity rules and the reformed procedure, the rigors of the common law have no application to the facts before us.

It may be thought that the appellant may present a simple claim against the estate for money had and received. This suit was brought May 19th, 1909. All claims against estates are required to be filed within a short time limit to entitle claimants to participate in the inventoried assets. When Nellie Fagan is driven from this court empty-handed, she will not only have lost all interest in the home, in which her mother admittedly invested the net earnings of almost a life's toil, to those who have never invested a penny therein, but will be mulcted in a large bill of costs that will probably consume her net earnings for many years, and it is not probable that this simple-minded colored girl will be disposed to hazard another long journey in courts which can give her no assurance of more substantial remedies than mere sympathy, while confessing that her claim is "morally just."

In fact, the machinery of the courts is so inordinately expensive that those of small affairs cannot expect to reap any real relief therethrough, if only one journey is required, and they may well expect to really lose, though the courts may announce a success, if the journey must be doubled.

We think it the purpose of equity and the reformed procedure, that the courts shall, from the threshold to the termination of every suit filed, make it a point of every effort that the controversy be decided and determined on the merits, in a single proceeding, and justice awarded in the spirit of equity and the liberalized reformed procedure, oblivious of the musty precedents created by the technical rigors of the common law.

We do not believe, with all due deference to the

majority of the court, that any technical rule of evidence, or any finespun technical distinction, as to whether the facts in this case bring it within the purview of an equitable lien or a resulting trust, is sufficient to justify the creation of the paradox exhibited in this case of having the moral rights of the appellant standing on one side of a dead line in defeat, and the appellees, confessed to be in the wrong by the trial court in its announcement, standing upon the other side, with their unrighteous cause supported by the decree of a court of equity.

MORGAN, J., concurring.

Decided September 15, A. D. 1913. Rehearing granted; judgment affirmed on rehearing, February 11, A. D. 1914.

[No. 3685.]

McCracken v. Montezuma Water & Land Company.

1. **CONSTITUTIONAL LAW—*Maximum Rates for Use of Water.*** Under sec. 8 of article 16 of the constitution, neither the legislature nor any court has power to fix a maximum rate for the delivery of water. The power is vested exclusively in the boards of county commissioners.

The board can act only on the petition for an interested party.

The rate fixed by the board, when acting within its jurisdiction, is binding upon all persons affected thereby until vacated by the decree of some court of competent jurisdiction.

The board is not charged with the duty of seeing that the prescribed rate is observed by the carriers of water.

2. — ***Presumptions.*** It will be presumed, the contrary not appearing, that in prescribing a rate the board acted solely upon the evidence produced before it, without any mixture of improper motive, and that the evidence was sufficient to support the order.

3. — ***Prior Injunction—Effect.*** A decree of the district court vacated an order of the county commissioners prescribing a rate of charge, and enjoined the board from enforcing or attempting to enforce the rate so prescribed.

Upon a second petition, and due notice given to all concerned, the county commissioners, after full hearing, prescribed the same rate set

down in the previous order so vacated. Held that the second order of the board was not to be regarded as a violation of the injunction, and, not being assailed by any direct proceeding, and no lack of jurisdiction or excess of authority being shown, the rate prescribed thereby became the lawful maximum rate binding all concerned.

4. PLEADINGS—*Amendment—Liberality to Be Indulged.* *Nisi prius* courts should be liberal in allowing amendments which may tend to secure a full investigation of the merits of the controversy whenever this can be accomplished without undue hardship upon, or prejudice to, the opposing party.

More liberality is indulged in permitting the amendment of answers than of complaints.

Six days before the day of trial application was made for leave to file an amended answer. The failure to apply at an earlier day was excused, and the amendment set up matters constituting a complete *prima facie* defense to the action. The application was denied.

On appeal, there being no showing that the failure to apply at an earlier day occasioned any inconvenience or prejudice to plaintiff, the denial of the application was held an error.

Appeal from Denver County Court. HON. GEORGE W. DUNN, Judge.

Messrs. MELVILLE, SACKETT & CALVERT, for appellant.

Mr. T. J. O'DONNELL, and Mr. J. W. GRAHAM, for appellee.

HURLBUT, J., delivered the opinion of the court.

October 2, 1909, appellee, as plaintiff, filed its complaint in the county court of the City and County of Denver, to recover from defendant (appellant) a judgment in the sum of \$933.32 with interest, for balance alleged to be due for and on account of water delivered to defendant for irrigation purposes during the years 1903, 1904, 1905 and 1906 respectively.

The complaint contains four causes of action, claiming in each the sum of \$333.33 for water delivered and services rendered in delivering the same for the year,

alleging such sum to be the reasonable value thereof; admitting, however, a payment thereon of \$100 each year, or a total of \$400. Judgment by default was rendered against defendant for the sum demanded in the complaint, which was afterwards vacated by the court, and leave granted defendant to answer.

Thereafter, on December 24, 1909, defendant filed his answer, admitting plaintiff to be the owner of the ditch or canal mentioned in the complaint, and that the water was furnished by plaintiff, at the request of defendant, at the times specified in the complaint; but denying each and every other allegation therein, except those alleging payment by defendant of \$100 each of the years from 1903 to 1906 inclusive. The second, third and fourth defenses of the answer are about the same, except as to dates. They each allege a written contract between plaintiff and defendant, made prior to the irrigation season of 1902, whereby plaintiff was to carry and deliver $1 \frac{1}{9}$ cubic feet of water per second of time, from the Dolores river to the lands owned by defendant, for the sum of \$100, which defendant paid, and which contract price was not thereafter changed; that in the spring of 1903, 1904, 1905 and 1906, respectively, plaintiff's agent sent defendant a notice stating that \$100 was due plaintiff from defendant in advance for delivering to defendant $1 \frac{1}{9}$ cubic feet of water for the irrigation season of that year; that defendant paid the same and received from plaintiff a receipt therefor; that no further demand was made by plaintiff for furnishing water as aforesaid, up to the time this action was brought.

Replication was filed, denying (with some slight admissions) all new matters pleaded. Plaintiff recovered judgment, founded upon an instructed verdict which the court ordered the jury to return.

The first and second assignments of error relate to the action of the court in refusing to allow defendant to

withdraw his original answer and file in lieu thereof amended answers. The record shows that on March 5th the court denied a motion by defendant (supported by affidavits) to amend the answer. On March 10th the trial began, at which time defendant renewed his motion to file an amended answer substantially the same as that offered on March 5th, which was again denied by the court. Appellant insists that the refusal of the court to permit these amendments to be filed was reversible error.

Whether or not the county court abused its discretion in refusing defendant permission to file the amended answer depends largely upon the effect to be given to the proceedings before the county commissioners on February 26, 1903, wherein they fixed a maximum rate of \$90 per cubic foot per second of time for the irrigation season of each year. This proceeding defendant sought to plead as a defense to the action. If it constituted a good defense, its exclusion amounted to a denial of a trial of the cause on its merits. It was not a technical defense. The proposed amended answers allege in part that on January 6, 1903, The Montezuma Water & Land Company (appellee here) presented its verified petition to the board of county commissioners of Montezuma County, asking the board to fix a reasonable maximum rate of compensation for water delivered to consumers by its ditch or canal; that on the filing of the petition, the board, by order, fixed February 24th as the date when it would hear all parties interested in the matter; that within ten days thereafter petitioner caused printed copies of such order to be securely posted in ten public places throughout the water district; that an affidavit of such posting was filed with the board; that on February 24th hearing on the petition was begun before the board; that such hearing was continued to the following day and again continued to the succeeding day; that upon the last day, February 26th, and after the board had heard and exam-

ined all the testimony and proofs concerning the original cost and then present value of the works and structures of petitioner's ditch, and the cost of maintaining and operating the same, it entered its order (duly recorded) fixing the maximum rate above mentioned; that no further proceedings were had by said board for fixing such maximum rate; and that defendant paid petitioner the rate so fixed by the board for all water furnished him for each year mentioned in the complaint. The entire proceedings of the board appear to have been in harmony with the requirements of secs. 3265-6-7-8, Revised Statutes 1908, which sections are the same as secs. 1, 2, 3, 4, found at pages 291-3, inclusive, of the session laws of 1887.

Section 8, article XVI, of the constitution, reads as follows:

"The general assembly shall provide by law that the board of county commissioners in their respective counties shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations."

In conformity with this section the legislature enacted the four sections above cited, and therein provided a full procedure for establishing a reasonable maximum water rate by the board of commissioners. It is clear from the constitutional section quoted, that neither the legislature nor any court has power to fix a maximum rate to be charged for the delivery of water; and further, the board itself cannot of its own volition fix such rate. Its action can only be invoked upon petition of an interested party. Both by the constitution and statute the important duty of fixing a maximum rate is vested exclusively in the boards of county commissioners of the several counties. By said section 3265 the board is commanded each year at any regular or special session to

hear and consider *all* applications by interested parties, for fixing a reasonable maximum rate, and, if the affidavits presented by applicants show a reasonable cause therefor, proceed to fix such rate. By section 3268 the board is prohibited from changing any maximum rate so fixed by it within two years thereafter, unless upon good cause shown. It would seem to necessarily follow from the wording of this statute that at all times there exists in each water district a tribunal or public board, easy of access, which possesses ample power to fix a maximum rate for the delivery of water in such district. This power can be invoked by anyone interested, by filing a petition as provided by the statute. We think it immaterial in this case whether or not the board of county commissioners, acting under said statute, is deemed to be a judicial or a *quasi-judicial* body. It has the exclusive power to fix the maximum rate, and it would seem that said rate when so fixed is binding upon all persons within its jurisdiction, affected thereby, until set aside or annulled by a decree or judgment of some proper court. There seems to have been provided no appeal from its decision in fixing such maximum rate, and for that reason we think when such rate is once fixed by the board in accordance with the statute, the legislature intended it should be observed and obeyed by all persons or corporations affected by it until annulled by some proper court. It appears from the record that the board fixed a maximum rate under this statute in 1895, which rate we think should be considered as remaining in full force and effect at least until 1902, when, it is said, the district court held the rate fixed in 1895 void, but the only evidence of which is found in a decision of the supreme court reported in 39 Colo., at page 166, 89 Pac., 794, to which our attention is directed by the brief of appellee. Such decision was not pleaded and is not shown in the record.

It further appears from the amended answers that

after the district court had rendered its decree, appellee, on January 6, 1903, proceeding under the statute quoted, filed its petition with the board of commissioners, asking it to fix a reasonable maximum rate; that the board in conformity to the statute thereupon proceeded to, and did, on February 26, 1903, fix the reasonable maximum rate to be charged for water furnished in that district at \$90 per cubic foot per second of time, for the season of each year thereafter during which water was required by law to be run; that the board was engaged three days, to-wit, February 24-5-6, in hearing the application and considering testimony and proofs offered by all parties interested, concerning the original cost, the then value of the works and structures of the ditch, cost and expense of maintaining and operating the same, and all other matters pertaining to the subject-matter under investigation. Assuming such allegations to be true, it would indicate that the board fully and fairly acted upon appellee's petition, and gave full consideration to all matters affecting the subject-matter of their investigation, and reached its conclusions and formulated its order solely upon the evidence and proofs adduced at such hearing, without reference to the district court decree, or any other matters occurring prior to the time of such hearing. The record being silent as to whether or not the same conditions existed at the time the commissioners fixed the rate in 1903 as obtained at the time when the district court rendered its decree in 1902, it must be presumed that the rate fixed by the commissioners was supported by ample evidence and proofs adduced at the hearing, which warranted the rate fixed at that time. It is true that the rate was identical with that fixed by the commissioners in 1895, and which the district court declared to be void, at the time it issued the injunction. Had appellee felt aggrieved at the rate fixed in 1903, it could have directly attacked the same in some proper

court, just as it did when it challenged the rate fixed in 1895; or had it believed that the commissioners in fixing such rate were actuated by a spirit of defiance of the court, rather than by an honest desire to perform their duties conscientiously under the statute, it could, by appropriate proceedings, have tested the good faith of the commissioners in the 1903 proceedings. Appellee did not adopt this course, but is now insisting on this appeal that the court should find, as a matter of fact, that in the proceedings of 1903 the commissioners were actuated solely by corrupt motives, and a spirit of defiance of the injunctive order of the district court; and this without a scintilla of evidence to support such finding. However sincere appellee may be in its belief that the commissioners disregarded their sworn duty in that proceeding and wilfully denied it a fair hearing on the merits, we find nothing in the record that warrants such assumption.

Upon the question as to what was a proper rate for that district, the lower court exhausted its power in declaring the rate of 1895 void. It cannot be said that it had power to fix a maximum rate or any other rate for delivery of water. The decree of the court, however, went further than to declare the rate void. It enjoined the board from in any manner enforcing or attempting to enforce the maximum rate fixed by it. There is nothing in the constitution or the statutes that we can find which charges the board of county commissioners with the duty of seeing that its order so fixing the maximum rate is obeyed and followed by carriers or those furnishing water in the district. Inferentially, at least, the legislature appears to have relieved the commissioners from such duty, for, in said secs. 3273-4, it imposed a stringent and severe penalty upon any person or corporation refusing to deliver water at the maximum rate so fixed, and declared such refusal to be a misdemeanor,

subjecting the offender to a maximum fine of \$5,000 and a maximum term of imprisonment of one year, or both. Section 3274 goes further, and provides that if any corporation, in defiance or attempted evasion of the provisions of the act, shall refuse to deliver water to any consumer after tender of the compensation fixed, it shall be the duty of the attorney general to institute proceedings in *quo warranto* for the forfeiture of its corporate rights and franchise; and also compel its obedience by mandamus or other proceedings.

Even if it be assumed that the decree of the district court was in force, notwithstanding the appeal taken therefrom (not necessary to decide), how can it be said that the commissioners were violating the injunctive feature of the decree in proceeding, in 1903, under their statutory powers and duty to fix a maximum rate? As above shown, the commissioners in that proceeding were engaged in hearing evidence and proofs for the purpose of ascertaining therefrom what a reasonable maximum rate should be in that water district at that time. It is not pretended nor even intimated that they were attempting to compel the petitioner, The Montezuma Water & Land Company, or anyone else, to supply water to consumers in the district at a rate not in excess of that previously fixed by them in 1895, *viz.*, \$90 per cubic foot. Hence, we are unable to see, upon anything in this record, how their action in that proceeding can be construed as a violation or defiance of the order of the district court or the injunctive feature thereof. In fixing the maximum rate the commissioners were acting within their statutory powers. The order made by them fixing the rate could not be assailed collaterally, and, not having been attacked by a direct proceeding in a competent court to set it aside, and there being no showing or claim that the order or proceeding is void for lack of jurisdiction, or clear excess of authority, the rate fixed became

the existing, lawful, maximum rate for delivering water to consumers.—*Northern Colo. Irr. Co. v. Pouppirt*, 22 Colo. App., 563, 127 Pac., 125, and authorities cited. Any attempt by the carriers or others delivering water to charge or collect a higher rate was unlawful and made them thereby liable to the punishments and penalties above mentioned. If defendant had been allowed to file his amended answer and could have proven the allegations of the same, he would have established *prima facie* a complete defense to plaintiff's cause of action, for plaintiff admitted payment in full, by defendant, for all water delivered to him during each year, of a sum equal to the maximum rate fixed. Therefore, we think the court erred in refusing to allow the same to be filed, and that defendant's rights were prejudiced by such ruling. The first motion to file an amended answer was not made until six days before the trial, but there is no showing by the record that the failure to apply at an earlier time for permission to file the same would have caused plaintiff any inconvenience or in any way prejudiced its rights, or would have deprived it of a full and fair hearing on the merits. Plaintiff would have had five full days before the trial in which to ascertain the truth or falsity of the allegations therein contained.

As to the duty of a court where a motion is made to amend pleadings, it is well settled that the granting or denying of such motion is generally left to the sound discretion of the court. However, it seems to be the usual practice for courts to indulge in more liberality in permitting amendments to answers than to complaints. The brief extracts from authorities next hereinafter cited will be sufficient to show the general views of our own appellate courts on the subject, *viz.*:

In *Miller v. Thorpe*, 4 Colo. App., 559, 36 Pac., 891, it is said:

“The appellants are quite right in their claim that the power which the code gives to the court to permit amendments should be broadly and generously exercised to further the interests and protect the rights of litigants.”

From *Sellar et al. v. Clelland et al.*, 2 Colo., 532, the following:

“The great object of a trial is to secure justice to the parties engaged in the suit. Substantial rights should never be sacrificed to mere forms, and amendments should at all times be liberally allowed when they do not lead to surprise and injury.”

The court says, in *Cartwright et al. v. Ruffin*, 43 Colo., 377, 96 Pac., 261:

“From necessity, greater liberality exists in allowing amendments to answers than in amending complaints. Plaintiff may always, in the absence of a counter-claim, or cross-complaint, dismiss his action and begin anew; * * * But the defendant is not so fortunate. If by mistake he pleads an ineffective or insufficient defense, to say that he may not, by amendment, bring in a good defense, is to inflict a drastic penalty for his inadvertence or mistake; * * * Hence it is that, especially under code practice, the courts are more liberal in permitting the amendment of answers than in allowing the amendment of complaints.”

Lewis v. Jerome et al., 44 Colo., 459, 99 Pac., 562, 130 Am. St., 131, was an action wherein judgment in damages was obtained by the heirs of Jerome, plaintiffs, against Lewis, for having (as claimed) deeded certain land to Kitty M. Jerome without authority or right for so doing. After judgment for plaintiff, motion for new trial was filed by defendant, who at the same time asked leave to file an amended answer, alleging an additional defense. The motion was supported by affidavit, which

averred that the facts stated in the additional defense were not known to defendant at the time of filing his original answer, nor until the trial of the cause. The motion to amend was denied, as well as that for a new trial. The supreme court held that if the allegations of the amended answer were true, it showed the additional defense therein stated to be material to defendant's rights. The supreme court in that case was apparently convinced from the record that the refusal of the trial court to permit the filing of the amended answer resulted in a hardship to defendant, which should be remedied if warranted by the application of sound, equitable principles. For failure of the trial court to permit the amendment, the supreme court reversed the judgment.

Other similar rulings could be cited from our own appellate courts, as well as those of other jurisdictions, but no good purpose could be served by extending the list.

The *desideratum* to be reached in all legal controversies is to correctly determine the substantial rights of the parties litigant, and *nisi prius* courts can invoke no safer rule than to permit liberal amendments to pleadings, which tend to secure a full and fair trial upon the merits, when the same can be done without imposing undue hardships upon, or prejudicing the rights of, the party opposing such amendments. In the case at bar, affidavits were filed in support of the motions to amend, which showed that defendant was a non-resident of Montezuma county in 1903, when the commissioners fixed the maximum rate, and had no knowledge of such proceedings until a few days before the trial, and before the motion to amend was interposed. We cannot see how plaintiff could have been surprised or prejudiced by allowing the amended answers to be filed, as appellee here was the petitioner in the proceedings before the commissioners in 1903, and must necessarily have had full

knowledge of everything pertaining thereto. The only apparent reason given by plaintiff for opposing the motion to amend the answer was that it was not made in apt time. This was a strictly technical objection, and should not have prevailed over the substantial right of defendant to interpose the additional defense contained in said answers.

Whether or not the order of the board of commissioners was admissible in evidence without being pleaded need not be decided here, as it was offered and upon plaintiff's objection excluded. Our ruling that the plea should have been allowed carries with it the corollary that it is admissible when pleaded, unless defeated for reasons not appearing in the record now before us.

There are a number of other assignments of error relied upon by appellant, which have been ably discussed *pro* and *con* by counsel for both parties, which we deem unnecessary to notice, as the conclusions we have already reached are decisive of this appeal.

Entertaining the views above expressed, the judgment will be reversed and cause remanded.

Reversed and Remanded.

Decided October 14, A. D. 1913. Rehearing denied January 12, A. D. 1914.

[No. 3680.]

MUNTZING V. HARWOOD.

1. EVIDENCE—*Objections to Testimony.* Deed executed by the heirs of a decedent, the former proprietor. Objection, "it requires more than a showing that a person died intestate to entitle the heirs to convey." Held to admit the intestacy of the decedent named in the deed.
2. — *Pedigree—Evidence.* The evidence examined and held sufficient to show that certain persons named were the sole heirs of certain

deceased persons—the action being a bill to quiet title, and the defendant showing no right.

3. POSSESSION OF LANDS—*Constructive*. One having the title is constructively in possession of vacant lands.

4. QUIETING TITLE—*Plaintiff's Title*. The defendant showing no title cannot require the plaintiff to show either title or possession.

5. APPEALS—*Errors Not Noticed in the Brief*, are regarded as waived.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

MR. EGBERT MORE for appellant.

MR. ISAAC PELTON for appellee.

HURLBUT, J., rendered the opinion of the court.

July 23, 1909, appellee, as plaintiff, instituted an action against appellant to quiet title to land in Washington county. Judgment was rendered for plaintiff, and the cause is here by proper appeal.

Complaint was in usual form, to which defendant filed an answer containing a general denial, also a defense based upon a treasurer's tax deed alleged to have been duly recorded. To this answer plaintiff replied, denying defendant's title, and alleging that the tax deed was void on its face for a number of reasons therein set forth.

Appellant contends that the trial court committed reversible error in admitting in evidence, over his objection, a certain quit-claim deed conveying title to appellee. The deed recites that the grantors therein are the children and sole heirs at law of John H. Gear, deceased. It is conceded that said Gear was the father of said grantors, and held the title to the premises at the time of his death. The deposition of one W. D. Eaton was admitted in evidence, without objection. He was a disinterested person and not related to either party. It appears therefrom that Gear died in Washington, D. C.,

in July, 1900, and was the owner of, or had some title to, the land in question at the time of his death; that he left surviving him as his sole heirs at law Ruth G. Rand, Margaret G. Blythe, and his wife, Harriet F. Gear, the latter dying intestate in Burlington, Iowa, in October, 1902, leaving as her sole heirs at law said Ruth G. Rand and Margaret G. Blythe; that the quit-claim deed in question was submitted to deponent for his inspection, and he identified the signatures of Ruth G. Rand and Margaret G. Blythe, grantors therein. Defendant objected to the introduction of said quit-claim deed in evidence, in these words:

“I make the objection to the last deed (Ex. C.) offered in evidence, as incompetent and immaterial in the way of evidence, and that it does not appear that it conveys any title, that is to say, my proposition is that it requires something more than the showing that a person died intestate to enable good title to these lands to be conveyed by the deed of the heirs, and that this last deed, the quit-claim deed of these assumed heirs, is incompetent and immaterial to establish that fact.”

It would appear from this that appellant made no point on the proof of intestacy of John H. Gear, but rather by inference conceded it. The objection appears to be directed to the question of failure of proof on behalf of appellee showing that the grantors in the deed were the lawful and only heirs at law of John and Harriet Gear. In the absence of any evidence to the contrary, we think the evidence found in the deposition, coupled with the recitals in the deed, sufficiently shows that the grantors therein named were the sole heirs at law of both John and Harriet Gear, and that both the last two persons died intestate. Under the laws of this state said grantors inherited the property in issue, and the deed executed by them conveyed the title to appellee. Against defendant's failure to prove any title

whatever to the premises, this showing was sufficient to entitle plaintiff to the relief prayed for in his complaint.—*Gage v. Cantwell*, 191 Mo., 698, 91 S. W., 119. The record shows that John H. Gear at the time of his death was the owner of the premises through *mesne* conveyances from the government of the United States. There is no showing by the record that either party was in actual possession of the premises at any time. Plaintiff, however, was in constructive possession thereof by virtue of the title vested in him through such conveyances.—*Empire R. & C. Co. v. Bender*, 49 Colo., 522, 113 Pac., 494.

Under the record as it now appears defendant is practically out of court. He attempted to establish his pleaded title to the premises by offering in evidence a tax deed void on its face, which, upon objection, was excluded by the court. This being the case, he could not call upon plaintiff to prove either his title to, or possession of, the premises. In *Empire R. & C. Co. v. Bender*, *supra* (being an action to quiet title like the one before us), defendant there relied upon a title emanating from a tax deed void on its face, which, when offered in evidence, was rejected by the court. The court said:

“The moment defendant's alleged adverse title failed, as it did when it offered in support of it a tax deed void on its face, it had no further interest in the cause, and could raise no other issue. That part of its answer denying plaintiff's title and possession, under such condition, was in law a nullity. It is only when a defendant has shown by his answer that he has an interest in the property adverse to plaintiff, such as will entitle him, on proper proof, to some relief in connection therewith, that he is in position to put plaintiff to proof of his possession and ownership under the statute. To illustrate, if defendant had answered only a general denial, that would not have put plaintiff to proof, but would

have been equivalent to a disclaimer, and judgment must have gone for plaintiff on the pleadings. So in this case, when the defendant failed to establish its alleged adverse title, it was in effect out of court, and its offer to show naked legal title in a third person was wholly irrelevant and immaterial. It is only because of his adverse interest that a defendant is permitted to question a plaintiff's rights at all.—*Wall v. Magnes*, 17 Colo., 476, 30 Pac., 56; *Lambert v. Shumway*, 36 Colo., 350, 85 Pac., 89; *Weston v. Estey*, 22 Colo., 341, 45 Pac., 367."

We notice that the first assignment of error challenges the ruling of the court in rejecting the tax deed offered in evidence by defendant. That assignment is not in any way referred to in appellant's brief. It may, therefore, be considered as abandoned, and it will be presumed that the court ruled properly in excluding the deed from evidence.

The judgment appearing in all respects to be right, the same will be affirmed.

[No. 3702.]

PARKS ET AL. V. ROTH.

1. TRIAL—*Offer of Evidence for a Special Purpose.* One offering a deed as color of title merely cannot afterwards invoke it as evidence of title in fact.
2. TAX TITLES—*Void Deed.* A treasurer's deed reciting a sale to the county and an assignment of the certificate of purchase by the county clerk, after the lapse of three years from the sale, is void.
3. QUIETING TITLE—*Limitation.* The five-year statute of limitations (Rev. Stat., sec. 5733) is no plea to a bill to quiet title.
4. — *Tender of Taxes,* paid by the defendant, is not required prior to the institution of a suit to quiet the title as against one holding under a tax title.

5. — *Judgment—Record as Evidence.* The mere judgment entry, without the judgment roll, is not admissible as evidence of title.

6. *LIMITATIONS—Payment of Taxes.* Tax deed recorded April 22, 1901. A tax paid in 1902 for the year 1901 is not to be counted as one of the successive yearly payments mentioned in the statute. (Rev. Stat., secs. 4087, 4090.)

7. — *Color of Title.* A tax deed is not color of title until recorded.

8. — *Laches—Bill to Quiet Title.* The defendant had made no improvement upon the land nor done any act in respect to it, by reason of plaintiff's failure to bring his action at an earlier day. Held he was not in position to complain of the delay.

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE for appellants.

Mr. ISAAC PELTON for appellee.

HURLBUT, J., rendered the opinion of the court.

On December 27, 1909, appellee as plaintiff instituted an action against defendants to quiet title to land in Yuma county. Plaintiff recovered judgment, from which this appeal is prosecuted.

Defendants' answer pleads seven defenses, namely: (1) General denial; (2) title under tax deed recorded April 22, 1901; (3) the short statute of limitations, sec. 3904, Mills' Annotated Statutes; (4) decree of the county court of Yuma county quieting title to the land in defendants' grantors as against appellee, who was defendant in the county court proceedings; (5) the seven years' statute of limitations, based upon color of title made in good faith to vacant and unoccupied land, and payment of all taxes legally assessed thereon for seven successive years, sec. 4090, Revised Statutes 1908; (6) laches of plaintiff in not instituting his action to quiet title at an earlier day; (7) the failure of plaintiff, before beginning this suit, to make tender of all taxes paid by defendants.

Plaintiff's replication denies all new matter, and alleges the tax deed pleaded by defendants to be void on its face, stating reasons; that the decree of the county court pleaded by defendants was wholly void for want of jurisdiction in the court of the defendant or of the subject matter; that no summons or process was ever served upon Roth, defendant therein; that the attempted service was by publication, and no affidavit was ever filed in said action, upon which an order of publication of summons could be based, etc.

This appeal can be speedily determined, as substantially all the objections urged by appellants to the proceedings in the trial court have been heretofore passed upon adversely to their contentions, by either our supreme court or this court.

As to the second defense, the tax deed pleaded by defendants to defeat plaintiff's cause of action was not offered in evidence at the trial in proof of their title. It was offered by them, however, and admitted without objection, as color of title only. By not offering in evidence the tax deed as proof of the tax title pleaded, defendants wholly failed to establish that defense. Appellants say that appellee made no attempt to prove any defects in the tax deed, and, as the law presumes a tax deed to be valid unless defects appear therein, appellants' title will be conclusively presumed to be established, etc. Even if we for a moment concede appellants' reasoning to be sound, we at once discover, by an inspection of the tax deed, that it is void on its face for several reasons, one of which is that the land had been bought by the county at the sale, and the county clerk assigned the certificate of sale more than three years thereafter. This fact appeared on the face of the deed. It is unnecessary to cite authorities in this jurisdiction which hold such deeds to be void on their face. Both the supreme court and this court have heretofore held that under issues such as here

formed the failure to offer in evidence, as muniment of title, the tax deed upon which defendants rely for title, is tantamount to a failure to establish such title.—*Empire R. & C. Co. v. Irwin*, 23 Colo. App., 206, 128 Pac., 867, and cases cited.

As to the third defense, pleading the short statute of limitations, *supra*, in bar of plaintiff's cause of action, it is settled in this state that in this kind of an action the same is not available as a plea in bar.—*Munson v. Marks*, 52 Colo., 553, 124 Pac., 187; *Carnahan v. Hughes*, 53 Colo., 318, 125 Pac., 116; *Empire R. & C. Co. v. Mason*, 22 Colo. App., 612, 126 Pac., 1129.

The fourth defense pertains to the county court decree of Yuma county. A certified copy of this decree was offered in evidence at the trial and objected to by plaintiff, for the reason that the same was offered in proof of title without the judgment roll. The objection was sustained. This was not error.—*McLaughlin v. Reichenbach*, 52 Colo., 437, 122 Pac., 47.

The fifth defense was founded upon the seven years' statute of limitations above mentioned. The tax deed was recorded April 22, 1901. The first taxes paid thereafter by defendants were paid in 1902, for the year 1901, followed by payment of taxes, by them, for the years 1903-4-5-6. The payment in 1902 of the taxes of 1901 cannot be counted as payment of taxes for one of the seven successive years mentioned in the statute.—*Evans v. Howell*, 23 Colo. App., 219, 122 Pac., 47. It is clear, therefore, that defendants did not pay the taxes for seven successive years under color of title, which was only obtained upon recording of the deed on April 22, 1901, and that the defense failed of proof.

The sixth defense, pleading laches of plaintiff, is not tenable. Plaintiff proved fee simple title in himself from the government. It is admitted that the land, during all the time subsequent to the recording of the tax deed,

was vacant and unoccupied. That being the case, and neither party being in possession, plaintiff was in constructive possession, which followed in the wake of title from his fee simple ownership. Defendants did nothing on the land from any sense of security resulting from plaintiff's inactivity in failing to assume actual possession. Under these circumstances this defense is not established.—*Warren v. Adams*, 19 Colo., 515, 36 Pac., 604; *Vanderpan v. Pelton*, 22 Colo. App., 357, 123 Pac., 960; *Bush v. Stanley*, 122 Ill., 406, 13 N. E., 249; *Indiana & A. L. & Mfg. Co. v. Milburn*, 161 Fed., 531, 88 C. C. A., 473; *Compton v. Johnson*, 240 Ill., 621, 88 N. E., 991.

The seventh defense, founded upon plaintiff's failure to tender to defendants the taxes and interest paid by them, prior to the beginning of this suit, cannot be upheld.—*Empire R. & C. Co. v. Lanning*, 49 Colo., 458, 113 Pac., 491; *Empire R. & C. Co. v. Irwin*, *supra*.

The foregoing observations dispose of this appeal adversely to appellants. We find nothing in the record justifying a reversal. The judgment will be affirmed.

Judgment Affirmed.

[No. 3736.]

HESSELL V. NEAL ET AL.

1. CONTRACT—*Construed*. A receipt for money as part of the purchase price of lands described, bearing the signature of the vendors only, held a mere option.

2. VENDOR AND VENDEE—*Tender of Abstract of Title*. A receipt for \$500.00 as "part of the purchase price" of lands described, provided that an additional sum should be paid on a day named, abstract of title to be furnished showing a good merchantable title, and that if the additional cash payment should not be made on the day specified the receipt would be void, and the \$500.00 forfeited as liquidated damages.

The vendors called at the office of the purchaser on the day prior to that appointed for the second payment, to complete the transfer, and, that day being Sunday, called again on the following Monday, tendering the abstract. No demand for the abstract had been made by the purchaser. Held that the tender of the abstract was in time. The abstract being certified to within three days of the tender, and the land being situate in Weld county, while all the parties resided in Denver, it was observed by the court that it was unreasonable to expect an abstract certified down to the hour of tender.

3. — *Purchaser's Objections—Shifting Position.* The purchaser defaulting in the payment of the purchase money at the day stipulated, and then basing his refusal entirely upon his financial inability, cannot afterwards allege a defect in the abstract of title tendered to him, nor that it was not tendered in proper time.

4. *QUIETING TITLE—When the Action Lies.* Vendee of lands failed to pay an instalment of the purchase money at the day stipulated. The contract provided that upon such default it should be void, and both parties released, etc. Nevertheless the purchaser filed the contract for record, and asserted claim thereunder. Held that the vendors were entitled to a decree cancelling the contract and quieting their title.

Appeal from Denver District Court. HON. CARLTON M. BLISS, Judge.

Mr. GEORGE F. DUNKLEE, Mr. WALTER L. WHITE for appellant.

Mr. WILLIAM H. WADLEY for appellee.

CUNNINGHAM, Presiding Judge.

Appellant and appellees entered into the following agreement:

“Denver, Aug. 17th, 1909.

“Received of James Hessel the sum of Five Hundred (\$500.00) Dollars, being part purchase price on the following described property in Weld County, Colorado, being the entire section known as and numbered thirty-six (36) in township five (5) North of Range sixty-five (65) West of the 6th P. M., less four acres sold for a right of way, and containing 636 acres. Full considera-

tion to be Nine Thousand Five Hundred Forty (\$9,540.00) Dollars, terms as follows: Fifty-four hundred and forty (\$5,440.00) Dollars more in cash upon delivery of warranty deed on or before October 17th, 1909, and the balance of thirty-six hundred (\$3,600.00) Dollars to be secured by first mortgage on said section thirty-six, due on or before one year with interest at 6 per cent per annum payable at maturity.

“Deferred payments to be secured by note and deed of trust on said property.

“Abstract of title to be furnished showing a good merchantable title and a good and sufficient warranty deed to be delivered to the purchaser.

“If said payment of \$5,440.00 is not made or tendered on or before said date, *viz.*, October 17th, 1909, then this receipt to be void and of no effect, and both parties released from all obligations herein; and, in that event, the said \$500.00 paid on this date is to be forfeited as liquidated damages.

“In case title is found defective and cannot be corrected within a reasonable time, then this deposit of \$500 is to be returned and this receipt shall be null and void.

“Taxes for the year 1909, to be paid by present owners.

“JAMES L. NEAL,

“WILLIAM D. THOMAS,

Present Owners,”

October 17th, the last day provided for the transfer of the land described in the foregoing agreement, and the payment of the money, fell upon Sunday. On Saturday, October 16th, appellees called at appellant's office for the purpose of carrying out the conditions provided in the agreement, but appellant was not in. They called again on Monday, and offered to carry out their part of

the agreement. The evidence shows clearly that appellant was unable to raise the money, but asked for an extension of time. This the appellees declined to grant. Thereafter, appellant placed the agreement of record, and this suit was brought by appellees to have the same declared void and their title quieted. Appellant answered, alleging the performance on his part of all the conditions of the agreement, pleading a tender, and alleging his ability and willingness to pay the money which, by the agreement, he was required to pay. But, on the trial his own testimony showed that he was, even then, unable to raise the money, and that on October 29th, when he had made a written, and his only, demand for an abstract, he did not have the money with which to meet his payments under the agreement. Appellant seeks to excuse his failure to comply with the conditions of the agreement requiring the payment of \$5,440.00 on October 17th, by the fact that the appellees did not voluntarily, and without any request on his part, tender an abstract showing good, merchantable title, until within a day of the time, or a day after the time, the contract expired, and he insists that no sufficient abstract was ever tendered, and that, therefore, he has never been in default. This contention is wholly without merit. The evidence shows that appellees, on Monday, October 18th, tendered an abstract certified down to within three days of that time, and produced a patent, which had just been issued, running from the state to themselves, for the land in question. The land was situated in Weld county, and it was not reasonable to expect that an abstract to land situated in another county could be tendered in Denver, where all the parties lived, certified down to the hour at which it was tendered. Moreover, appellant did not, at the time the abstract was produced, base his refusal to pay the money which the contract required he should pay, upon any defect in the title or the insufficiency of the ab-

tract, but solely upon his financial inability to meet his payments. His own testimony shows conclusively that the allegations in his complaint that he has, "always been ready and willing, and still is ready and willing to pay the purchase price mentioned and set forth in said contract," were false, and it also shows that his attempted defense based on the alleged failure of appellees to tender good title is wholly without merit, and the merest subterfuge.

The agreement is nothing more than an option to purchase. Under it appellees could not require appellant to do anything, and if he failed to pay the \$5,440.00 on October 17th, it is specifically provided in the agreement that the receipt is to become void and of no effect, and that both parties should be released from all obligations thereunder, and it was further provided that the \$500 paid at the time the receipt was signed should constitute liquidated damages. Under these circumstances, the judgment of the trial court cancelling the option agreement and quieting title to the land therein described, and in this action involved, in the plaintiffs, was eminently proper, and the same will be affirmed.

Judgment Affirmed.

[No. 3779.]

DENVER PRESSED BRICK COMPANY v. LEFEVRE.

CONTRACT—Consideration. Offer of the soil of a lot, and a promise from the one to whom the offer is made to remove it. There was no understanding that the soil, or the value of it, was offered, considered, or accepted as a consideration for the promise to remove. *Held* that the engagement was gratuitous, and the promise to remove without consideration, and imposed no obligation or liability. The damage resulting

from the failure to remove the soil was no consideration for the promise to remove it.

Nor was the permission of the land-owner to the other to enter, or the surrender of possession for the purpose of affecting the removal.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Messrs. McKNIGHT & HENRY, and Mr. M. H. FARINGTON for appellant.

Messrs. FRANK T. JOHNSON, EDWARD RING, and OWEN E. LEFEVRE for appellee.

MORGAN, Judge.

On petition for rehearing the original opinion is modified and rehearing denied.

The appellee had judgment for \$824.10 in the Denver district court on her complaint, filed October 20, 1910, for damages for breach of a contract. Appellant assigns error, that no contract was made or proved, and that there was no consideration.

The complaint states that a contract was entered into for a good and sufficient consideration between the plaintiff and the defendant, whereby the latter agreed to remove the top soil from certain lots belonging to the plaintiff, to the depth of about five and one-half feet; that defendant removed part of it and refused to remove the balance. Damage is claimed for the breach.

The evidence of the plaintiff does not support the allegations of her complaint. Her husband testified that he called up the defendant brick company, by telephone, and talked with the superintendent, and, after telling him what he wanted done, made an appointment to meet him at the company's yards, the superintendent saying that, in the meantime, he would look at the lots from which the plaintiff wanted the soil removed; that they met, pur-

suant to the appointment, and walked over to the lots, at which place they discussed the manner in which the soil should be removed, and where the work should begin; that he told the superintendent what he wanted done, and explained how he wanted to build on the lots, by removing all the dirt, and facing his buildings toward the north, and thus gain greater frontage; that he thought the defendant's teams were at work at that time, removing the soil; that the superintendent said at that time that he would remove it, and afterwards did remove a portion, but not all, of it; that he asked the superintendent some time thereafter, and after work had been suspended, when he intended to finish it, and that the superintendent replied that he would do so as soon as the spring season opened. He further testified that he went to Europe soon after that, and, while in Paris, received a letter from the brick company stating that it found the dirt did not make good brick and that it would not remove the balance of it. Stripped of all immaterial matter the foregoing is all of the plaintiff's evidence, except some testimony as to what it would cost to remove the balance of the dirt.

The defendant, by its answer, denied the contract, alleged, and the consideration, and stated that the plaintiff offered to give the soil to it, and that, to said offer it answered that it would take it and not charge the plaintiff anything for removing it, if it proved suitable for the manufacture of faced brick; that it did not prove suitable; and denied the damage alleged.

The defendant offered no testimony as to the alleged contract, nor to prove that the acceptance was conditional, but only that it tested the soil and found the brick made from it were full of white specks, not first class, and were salable for a less price on the open market than its own brick; and, as plaintiff denied in her replication

that the acceptance was conditional, that matter will not be considered.

From all the evidence and the admissions in the answer it is impossible to infer anything more than this: that there was an offer of the plaintiff to give the soil to the defendant and an acceptance thereof coupled with a statement by the defendant that it would remove it, and the removal of a portion of it. This does not constitute a contract enforceable at law or in equity, or upon which an action for damages for a breach thereof will lie. There is a motive on plaintiff's part to have the soil removed without cost, and a willingness on defendant's part to take the dirt off without charge, but an utter lack of an intention to make a binding legal contract. In the absence of any proof of an understanding that the value of the soil, or the soil itself, was offered, considered and accepted, *as a consideration* for defendant's promise to remove it, the offer and acceptance were gratuitous.—Bouvier's Law Dictionary, p. 425. The evidence does not even disclose that the plaintiff offered to give the soil to the defendant, *if it would remove it*, that is, as a consideration for so doing, nor that defendant promised to remove the soil and accept the same *as payment for so doing*; and, what the effect of such testimony might have been, it is not necessary to determine. It follows that no genuine legal mutuality of obligation or engagement was proved to support the allegations of the complaint; and there was no consideration, in law, for the promise upon which the breach is predicated.

The evidence of the alleged contract may be stated as in Anson on the Law of Contract (Eleventh English Edition), page 112:

“A offers to do X a service without reward: the offer is accepted: no action would lie if the service were not performed, because there was no consideration for the promise of A.”

Parsons also says, in vol. 1, p. 486 (9th ed.) :

“If one promises to teach a certain trade, this is a consideration for a promise to remain with the party a certain length of time to learn, and serve him during that time; but, without such promise to teach, the promise to remain and serve, though it be made in expectation of instruction, is void. The reason of this is, that a promise is not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement.”

This disposes, also, of appellee's contention of a promise for a promise as the consideration.

“A promise to make a gift lacks consideration and is unenforcible.”—9 Cyc., 318. As defendant could not enforce the gift of the soil from the plaintiff, she could not enforce defendant's promise to remove it.

In *Smith & Smith's case* (K. B.), 3 Leonard, 88 (decided in 1583), Keener's Cases on Contracts, vol. 1, p. 338-9, Lambert Smith, executor of Thomas Smith, deceased, sued John Smith on a promise John made to Thomas to “procure the assurance of certain customary lands” to one of testator's children “in consideration that the testator would commit the education of his children and the disposition of his goods after his death during the minority of his children, for the education of his children to him,” (John), and Wray, C. J., said:

“Here is not any benefit to the defendant that should be a consideration in law to induce him to make this promise, for the consideration is no other but to have the disposition of the goods of the testator *pro educatione liberorum*.”

The theory of the appellee, that the damage arising from the breach is a sufficient consideration for the contract, is wholly untenable. If such loss or damage was

sufficient to constitute a consideration, then a mere naked promise on the part of A to pay B a sum of money and an acceptance of such a promise on the part of B and a subsequent failure and refusal of A to comply with the promise would be a valid contract enforceable at law, because B was damaged and suffered a loss by A's failure to pay the sum of money promised. A promise, even of a thing of value, which can be enforced, must be made in consideration of a like promise.—*Gutheil v. Schmidt*, 8 Colo. App., 71, 44 Pac., 853; *Stiles v. McClellan*, 6 Colo., 89.

Neither can any of the following be accepted as a consideration, as contended by appellee.

The failure of defendant to keep its promise and to remove all of the soil was not a loss or detriment to the promisee that entered into the contract *as a consideration*, but only arose from the failure to perform. Of course, a nominal loss, at least, is presumed to arise upon the breach of any contract, but this does not arise until the breach occurs, and the breach cannot occur until after the contract is made, hence it cannot be looked upon as a reason or consideration for the contract.

“It makes no difference that one to whom a naked promise was made has suffered through relying or acting upon it. The detriment to the promisee which suffices as a consideration for a contract must be a detriment on entering into the contract, not from the breach of it.”—9 Cyc., 316; *Ridgway v. Grace et al.*, 2 Misc., 293, 21 N. Y. Supp., 934.

In *Casserleigh v. Wood*, 119 Fed., 308, 311, 56 C. C. A., 212, 215, the court said:

“Whether a contract rests upon a valuable consideration or otherwise must be determined by conditions that exist when it is made.”

Defendant's refusal to remove the soil must not be confounded with the agreement itself.

“An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is ‘the cause or meritorious occasion requiring a mutual recompense in fact or in law.’” “Nothing is a consideration that is not regarded as such by both parties.”—*Philpot v. Gruninger*, 14 Wall., 575, 20 L. Ed., 743; Keener's Cases on Contracts, 319, 323.

It is true that, however infinitesimal a thing may be, or may afterwards prove to be, that is offered and accepted as a consideration for a contract, it may be sufficient, if it be offered and accepted as a consideration, and not as a gift, or under a state of facts that discloses a gratuitous undertaking.

It cannot be said that the removal by the plaintiff of the rich, loose soil, from the top of that defendant was to take, was a consideration for the contract, because this was done at plaintiff's instance, for the reason that she wanted to use it, and not at defendant's request, was not spoken of at the time of the original arrangement, and would not convert a gratuitous undertaking into a legal contract. Nor can it be maintained that plaintiff's permission for defendant to have the right to enter upon the premises and remove the soil, and the surrender of possession for such a purpose, was a consideration, because this was merely incidental to, and in harmony with, the gratuitous arrangement, and would not be a real consideration if the contract had been other than gratuitous, as this would not be a thing contracted for nor in the minds of the parties as a consideration when the arrangement was made.—*Sterne v. The Bank of Vincennes et al.*, 29 Ind., 549.

Neither could plaintiff claim damage for the manner in which defendant removed part of the soil, nor for the condition in which the lots were left, because her husband

testified that he acted as her sole agent in the entire transaction, and that no claim was made for anything except the failure to remove the balance of the soil. It is true that if defendant so negligently performed its gratuitous undertaking as to cause damage to the plaintiff, she might recover, but her husband's testimony wholly eliminated this proposition.

“A gratuitous promise or undertaking may indeed form the subject of a moral obligation, and may be binding in honour, but it does not create a legal responsibility.”

The motion for a non-suit, or for a directed verdict, interposed by the defendant, should have been sustained; and, therefore, the judgment is reversed, with directions to dismiss the suit.

CUNNINGHAM, P. J., dissenting.

Decided December 8, A. D. 1913. Rehearing denied February 11, A. D. 1914.

[No. 3783.]

HENEGHAN V. CAHILL.

No question of law being involved and the findings and judgment below not being opposed to the weight of the evidence, the judgment was affirmed.

Appeal from Denver District Court. HON. HARRY C. RID-
DLE, Judge.

Mr. JOHN T. BOTTOM and Mr. MILNOR E. GLEAVES
for appellant.

Messrs. YEAMAN & GOVE, Mr. GEORGE P. STEELE for
appellee.

Per Curiam.

In their brief, counsel for appellant frankly admit (and their admission is entirely justified by the record) that substantially their whole contention in this case is that the findings and judgment of the trial court are so against the weight of the evidence as to indicate passion, misapprehension, or some other improper consideration, on the part of the trial court, and that for this reason the judgment in this case should be reversed.

The case was tried to the court without a jury. We have carefully examined the entire record, and given the briefs filed by appellant due consideration. From our examination of the record, we are not able to agree with appellant's contention that the findings and judgment of the trial court are against the weight of the evidence. There are no principles of law involved requiring a written opinion at our hands. An elaborate discussion of the evidence would, therefore, necessarily take the form of an argument based solely upon facts, and such argument would be of no advantage to the profession, or to the parties to this action.

The judgment of the trial court is affirmed.

Judgment Affirmed.

[No. 3788.]

BABCOCK ET AL. V. THE CITY OF ROCKY FORD.

1. CHECK—*Presentation for Payment.* There is no hard and fast rule as to when a check must be presented for payment. It must be presented within a reasonable time, which depends on the situation of the parties with reference to one another, and to the bank, as well as all other material facts and circumstances attending the transaction.

The cashier of a bank was also treasurer of a municipal corpora-

tion. In the latter capacity he received from the city clerk a check drawn upon the same bank. Knowing that the bank was in failing condition he omitted to present the check on the day of its receipt, alleging as an excuse that he "did not have time," and, on the next secular day, the bank closed its doors. Held he was derelict in failing to present the check on the day upon which it came to him.

2. **PUBLIC OFFICER—Liability for Public Moneys Lost by Failure of Bank.** A city treasurer who deposits the money of the city in a bank is liable therefor if lost by the failure of the bank.

3. **MUNICIPAL CORPORATIONS—Liability of Treasurer.** Under Rev. Stat., sec. 6639, the city council have the election to either designate a bank where the corporate funds shall be kept, and thus relieve the treasurer and his sureties if the bank fails, or to decline making such designation, holding the treasurer as an insurer. The designation must be made by ordinance.

The deposit by a city in a bank of large sums of money as special interest-bearing deposits does not amount to such designation.

Appeal from Otero District Court. HON. J. E. RIZER, Judge.

Mr. G. Q. RICHMOND for appellant.

Mr. H. M. MINOR for appellee.

CUNNINGHAM, Presiding Judge.

Babcock, the appellant, was elected treasurer of the city of Rocky Ford, by the council of that city, and assumed the duties of his office on August 6, 1907. On August 15, 1908, he resigned from the office of city treasurer, and his successor was chosen. After his resignation, he failed to deliver to his successor money belonging to the city which had come into his, Babcock's, hands, to the amount of \$3,769.09, as contended by plaintiff; and as admitted by defendant, he failed to turn over money that had come into his hands as treasurer, belonging to the city, to the amount of \$3,185.14. The difference between the amount alleged to have come into Babcock's hands, and the amount admitted by him to have come into his hands, grows out of a transaction whereby the

city clerk gave to Babcock his check for \$583.95, which the city contends Babcock ought to have promptly presented to the bank on which it was drawn, but which he did not present, and within a day or two after the city clerk had delivered this check to Babcock the bank failed. The check in question was dated December 30, 1907, and was drawn upon the State Bank of Rocky Ford; it represented money which the city clerk had collected, and in this manner attempted to turn over to Babcock as treasurer. Babcock insists that the check was not delivered to him until the morning of December 31st, while the city clerk testified unequivocally that he delivered the check to Babcock in the afternoon of December 30th, the date it was drawn. The importance of the date of the delivery of the check grows out of the fact that the bank remained open and continued to receive deposits and transact business in the usual way throughout the entire day of December 31st. The following day, January 1st, was a holiday, and on January 2nd the bank failed to open, and went into the hands of a receiver. It is contended on behalf of appellants that Babcock, under the ordinary commercial rules and the authorities pertaining thereto, had all of the day following the day on which he received the check in which to present the same for payment, and therefore, if he received the check on the 31st, he ought not to be held responsible for his failure to present it.

1. There is no hard and fast rule on this subject. As is well said in a recent opinion of the supreme court of West Virginia:

“Presentation of the check for payment in the bank on which it is drawn must be made within a reasonable time, and what is a reasonable time depends upon the situation of the parties with reference to one another, and with reference to the bank, and all other material facts and circumstances entering into the transaction.”

—*Lewis Co. v. Montgomery Co.*, 59 W. Va., 75, 52 S. E., 1077, 4 L. R. A. (N. S.), 135.

The facts in the case before us, as disclosed by the record, are: that Babcock, payee of the check and city treasurer, was an employe of the State Bank of Rocky Ford, on which it was drawn, and, according to his statement, the check was delivered to him in the forenoon of December 31st; while he was in the bank, back of the counter, presumably discharging his duties as assistant cashier. The bank was in a failing condition, and Babcock admits, on cross-examination, that he knew the bank was "having a hard time," and his only excuse for not promptly presenting the check for payment was, to use his own language: "Because I did not have time. I was working for the State Bank of Rocky Ford." He seems to have regarded his duty to the bank as paramount to his duty to the public. This contention cannot be allowed. Under the circumstances just related, and in view of the fact that the following day was a holiday, Babcock was derelict in his duty in not presenting the check on the day he received it, if he received it, as he says, in the morning of December 31st.

The case was tried to the court without a jury. The findings were general, and in favor of the city. It may well be assumed that the trial court found from the evidence that the check was delivered to Babcock on December 30th, as testified by the city clerk, and if the trial court did so find, the evidence to support such finding is ample. Our conclusion, therefore, is, that as to the liability of Babcock, no distinction can be drawn between the money represented by the check which Babcock ought to have presented and collected, and the balance of the money which had been on deposit in the bank for some time prior to its failure.

2. Babcock seeks to escape liability for his failure to turn over to his successor any of the money, on the

theory that he is relieved from this obligation by the failure of the bank. His contention in this behalf is contrary to the ruling in *Gartley v. People*, 24 Colo., 155, 49 Pac., 272, and re-affirmed by unanimous court in *Gartley v. People*, 28 Colo., 227, 64 Pac., 208. The liability of public officials for public money coming into their hands, and lost by bank failures, is very ably discussed by Chief Justice Hayt and Justice Goddard in a dissenting opinion in the first Gartley case, and we shall make no attempt to review the authorities which are there so ably analyzed. It may not be amiss, however, to call attention to the fact that in the second Gartley case, Mr. Justice Gabbert used this language:

“The first decision was announced in this case in 1897. In 1893 this court, in *McClure v. La Plata County*, 19 Colo., 122, held that the liability of county treasurers for public funds collected was express and extraordinary. In the face of these decisions, the law-making power has not indicated by any act that the liability of a receiver of public money should not be as great as this court has declared. If the liability thus imposed is too onerous, relief must come from the legislature. Courts can only declare the law as it now stands.”

The second Gartley case was decided in January, 1901, and the legislature has not yet seen fit, by any enactment, to relieve public officials from the express and extraordinary liability fixed upon them by the decisions of the supreme court of our state. Moreover, even under the dissenting opinion of Judge Goddard in the first Gartley case (p. 174) it is only contended that a public official should be relieved from liability:

“Where he exercises the strictest care in selecting a bank of unquestioned solvency in which to deposit the public money, and being guilty of no fault in leaving it there, and the money is lost through unexpected failure of the depository.”

There is no comfort for the appellants in the case before us in the rule which Judge Goddard contended for, since Babcock, by his own admission, knew that the bank in which he was employed, and in which he saw fit to deposit the public money, was, on the 31st day of December, and even prior to that time, to use his own language, "having a hard time."

3. It is further contended on behalf of appellants that under section 6639, R. S., it is made the duty of treasurers of towns and cities to keep all money in their hands belonging to the municipal corporation in such a place of deposit as may be designated by ordinance. It is not contended that the city of Rocky Ford had by ordinance designated any place of deposit for the city funds. Indeed, it is admitted by the pleadings that the council had not done so. We are not impressed with appellant's contention that the word "may," in the aforesaid section, is equivalent to "must" or "shall." It is our opinion that under the statute the city council had the right of election as to whether it should designate the depository for the treasurer, and thus take the risk of relieving him and his bondsmen from liability in case the depository should fail, or of holding the treasurer as an insurer and declining to make the designation. The mere fact, if it be a fact, as contended on behalf of appellants, that the city had, at the time Babcock was chosen treasurer, and continued thereafter to have, large sums of money deposited in the State Bank of Rocky Ford, in the form of special interest-bearing deposits, does not amount to a designation by the council of said city of said bank as a depository for its funds, and imposed no duty upon the treasurer to deposit all other funds there. There is no attempt in this case to hold the city treasurer liable on account of these special deposits. The terms and conditions under which they were made are not disclosed by the abstract, but it is disclosed, as we have already

pointed out, that no ordinance had been passed designating the bank as a city depository.

The judgment of the trial court in favor of the city and against appellants is affirmed.

Judgment Affirmed.

Decided December 8, A. D. 1913. Rehearing denied January 12, A. D. 1914.

[No. 3798.]

CHURCH v. MYERS.

APPEALS—*What May Be Assigned for Error.* Action in Logan county court. Defendant's application for a change of venue denied. Whereupon defendant answered, and the issues were made up. The trial resulted in a judgment for plaintiff. Defendant appealed to the district court, where his application for a change of venue was allowed, and the cause transferred to the Denver county court. In that court the defendant objected to the assignment of the cause for trial without affording him opportunity "to raise such issues of law and fact as he might be advised," claiming that all proceedings in the Logan county court, after the denial of his application for the change of venue, were *coram non judice*, and void. But he failed to tender any pleadings in lieu of those upon file, or ask for time to present such substitute pleadings, or make it appear what issues he proposed to present; moreover, the cause being set down for trial, he participated therein, making no further objection. *Held* that to reverse the judgment, simply to reform the issues and afford defendant a third trial, would be a violation of the provisions of sec. 84 of the code.

Appeal from Denver County Court. HON. H. S. CLASS, Judge.

Mr. JOHN F. TOURTELLOTT and Mr. THOMAS E. WATERS for appellant.

Mr. BERT MARTIN for appellee.

MORGAN, Judge.

Petition for rehearing is denied; original opinion is withdrawn and the following substituted.

The action was begun in the county court of Logan county; application for change of venue to Denver county court denied, followed by the joining of issues on the pleadings, and a trial resulting in a judgment against defendant, Church; he appealed to the district court of said county, and renewed his application for change of venue, which was allowed, and the cause sent to the county court of Denver county, where another trial resulted in a verdict and judgment against defendant, Church, who brought the case here on appeal.

It is contended by appellant that the county court of Logan county had no further jurisdiction of the cause beyond carrying out an order granting his motion that he filed there, in apt time, for a change of venue to Denver county, where the defendant lived and was served with process; and that, as the district court, aforesaid, sustained his motion for a change of venue, renewed in that court, on appeal, and sent the case to the county court of Denver county, it was error for the latter court to set the case for trial without first giving him an opportunity "to raise such issues of law and fact on the original complaint as he might be advised;" claiming that the cause was not at issue in the latter court, for the reason that all proceedings settling the issues in the county court of Logan county were void and of no effect, because done after motion for change of venue was filed.

Assuming, but not deciding, that the order of the district court, granting the change of venue, not being excepted to, but acquiesced in, by appellee, annulled all proceedings in the county court of Logan county, after the denial of the change of venue therein; nevertheless, the files which included the pleadings therein, joining the

issues, were on file in the Denver court when the plaintiff moved to have the cause set for trial on the merits, and were not expunged or struck out by the order of the district court, as it is not a court of review. The defendant, Church, resisted this motion, Turman not appearing, on the ground that the cause was not at issue in that court, but he did not offer nor tender any pleadings to take the place of those on file, nor was any request made for time in which to do so, nor does he show to this court in what particular he was prejudiced by the action of the court in setting the cause for trial, on the issues as made by the pleadings on file, except to say that he was deprived of raising issues of law and fact on the complaint; nor does the record show what issues were intended to be raised. It must be concluded that the lower court examined the files and found therein an amended complaint, a bill of particulars thereupon, an answer of the defendant, Church, and an answer and cross-complaint of defendant, Turman, the alleged agent of Church; and, as Turman did not appear in any way, it must be further concluded that the lower court duly considered all objections raised by Church, including the form and regularity of the pleadings joining the issues, and found that no injustice would be done and no substantial right denied by adopting the issues made by the pleadings on file, and, for that reason, set the cause for trial upon the same. There is nothing in the record or in appellant's contentions to show that the issues were not sufficient, or that any pleading was proposed by which to supply any insufficiency. Furthermore, he joined in the trial and produced his evidence, with no further objection than the objection to the setting; and nothing prejudicial to him appears throughout the trial, caused by reason of the court's action, aforesaid, or otherwise. To reverse the case now simply to have the issues made up again, and permit the defendant to have a third trial would be an

injustice to the appellee, as well as contrary to that statute which says:

“The court shall in every stage of an action disregard any error or defect in the pleadings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.”

Appellant further contends that the proof of agency was insufficient between Church, the defendant, and Turman, who employed the plaintiff and those who assigned their claims to him. The action was commenced against both Church and Turman to recover for men and teams used in cleaning a ditch on a ranch belonging to Church. The action was dismissed as to Turman, and his cross-complaint struck from the files by the Logan county court, and no appeal was taken by him to the district court, nor does he appear in the Denver court, or in this court.

The evidence has been carefully examined and considered, and it is concluded that it was sufficient to justify the court in submitting the issue of agency to the jury and to sustain the verdict for the plaintiff against Church. No useful purpose can be subserved by a discussion of the evidence, and the law applicable thereto, as no question would be decided which has not been announced by former decisions of this court and the supreme court of this state.

The appellant further contends that there was a variance between the pleadings and the proof; that error occurred on the admission and in the exclusion of certain evidence; that the court erred in permitting an amendment of the complaint after the evidence was in, and that the assignments of the other claims to plaintiff were irregular, and the proof insufficient thereupon as to the same question of agency already disposed of; but it is concluded that there was no reversible error committed

by the rulings of the lower court upon any of these matters.

The judgment is affirmed.

Decided December 8, A. D. 1913. Rehearing denied February 11, A. D. 1914.

[No. 3804.]

BAXTER V. BECKWITH.

1. LIMITATIONS—*When the Action Accrues—Demand Note.* A promissory note bearing date "4-12-1901" was expressed to be payable " * * * after date." Interest was declared to be payable annually and to draw interest as principal. No demand of payment was made until 1904, and interest was paid from 1902 to 1906. *Held* manifest, in view of the terms of the paper and the conduct of the parties that it was not the intention that the note should become immediately due, and that the statute of limitations began its course upon the demand made in 1904.
2. NEW TRIAL—*Affidavits of Jurors*, assuming to set forth the means used in reaching the verdict and the intention of the jury, will not be considered upon appeal.
3. INTEREST—*Contract for—Law of Place.* Parties may lawfully stipulate for the payment of interest, according to the law of the place of payment. Interest may be recovered accordingly, although the contract be unlawful by the laws of the state where the contract was made.
4. — *Interest Upon Interest*, may, by express contract, be recovered, where this is permitted by the law of the place of payment.
5. JUDICIAL NOTICE—*Decisions of Foreign Courts.* Where the law of another state is in question, the decisions of the highest court of such state will be judicially noticed.

Appeal from Denver District Court. HON. GEORGE W. ALLEN, Judge.

Mr. JAMES A. HARRIS, Mr. JOHN F. MAIL, and Mr. PAUL DELANEY for appellant.

Mr. EWING ROBINSON and Messrs. SPENCER & LANDIS for appellee.

BELL, J.

This action was brought upon a promissory note, which was set forth at length in the pleadings and reads as follows:

“\$1,300.00 Red Oak, Iowa, 4-12-1901.

“..... after date, for value received, we promise to pay to the order of Mrs. E. H. Beckwith the sum of thirteen hundred dollars, with 7 per cent per annum interest from date. Interest payable annually, and to draw interest as principal. Payable at Red Oak National Bank, of Red Oak, Iowa. We further agree to pay a reasonable attorney's fee in case suit is brought on said note. Said fee to be taxed up as part of the cost of suit. And it is also agreed that a Justice of the Peace shall have jurisdiction hereon to an amount not exceeding three hundred dollars.

(Signed) “S. L. BAXTER.”

The appellant, defendant below, pleaded payment and the statute of limitations, and the appellee replied, denying the payment in whole or in part and alleging that, in the latter part of 1904, March, 1905, and in August, 1906, the appellant made unqualified promises to her to pay said note. A trial was had to a jury in the district court of the city and county of Denver, resulting in a verdict in favor of the appellee in the sum of \$1,250.00, upon which judgment was duly entered.

The appellant urges that the note sued upon, being a demand note, became due immediately after delivery, and that, therefore, the statute of limitations operated from that date and became effective before the suit was brought.

We think it manifest, from the terms of the note and the evidence in support thereof, that it was not the in-

tention of the parties that the same should become immediately due. Provision was made in the note for annual interest and for interest upon interest, and the evidence shows that no demand was made for payment until during the year 1904. We think that, under the circumstances attending the making of the note, the form thereof, and the conduct of the parties regarding the payment thereof, it falls within the purview of such demand notes as are not intended by the parties to become due or actionable until after demand for payment; hence, the statute did not commence to run until demand was made in 1904.—*Montelius et al. v. Charles*, 76 Ill., 303; *Yates v. Goodwing*, 96 Me., 90, 51 Atl., 804; 7 Cyc., 847, 849, 976; *Williams v. Taylor*, 120 N. Y., 244, 24 N. E., 288; *Jameson v. Jameson*, 72 Mo., 640; *Leonard v. Olson*, 99 Iowa, 163, 68 N. W., 677, 35 L. R. A., 381, 61 Am. St. Rep., 230. See, also, 4 Am. & Eng. Encyc. of Law (2nd ed.), pp. 150, 151, b and bb; and 1 Daniel on Negotiable Instruments (4th ed.), pp. 585-589, secs. 606, 607, 608, 609 and 610.

However, the evidence of appellant is wholly inconsistent with his plea of the statute of limitations, as he testified and showed that he made payments on the note from November, 1902, to 1906, and the jury must have allowed considerable credits upon the note, since the verdict is so much less than the principal and interest due thereon. The evidence supported neither the defense of full payment nor the defense of the statute of limitations.

We find in the record affidavits of individual jurors as to the means used in reaching the verdict and the intention of the jury in the verdict so reached. It would be improper for us to attempt to test the correctness or incorrectness of this verdict, or the scope of it, by a resort to these affidavits.—*Wray v. Carpenter*, 16 Colo., 271, 27 Pac., 248, 25 Am. St., 265; *Johnson v. People*, 33 Colo., 224, 80 Pac., 133, 108 Am. St., 85.

The most serious question raised in the record in-

volves the enforcement of that part of the demand note contracting for compound interest. If the laws of Colorado were to govern, the instruction of the court, to which exception is taken, directing the compounding of interest, as provided in the note itself, might be reversible error.—*Filmore et al. v. Reithman*, 6 Colo., 120, and authorities cited; *Denver B. & M. Co. v. McAllister*, 6 Colo., 268; *Beckwith v. Beckwith*, 11 Colo., 568, 19 Pac., 510; *Hochmark v. Richler*, 16 Colo., 265, 26 Pac., 818; *Wigton v. Elliott*, 49 Colo., 119, 111 Pac., 713.

The parties may legally stipulate for the payment of interest according to the laws of the state where the instrument is made, or according to the laws of the place of payment, and the rate thus agreed upon may be recovered, although it may be illegal under the laws of the other state.—*Eccles v. Herrick*, 15 Colo. App., 350, 62 Pac., 1040; *McKay v. Belknap Sav. Bk.*, 27 Colo., 50, 59 Pac., 745.

Ordinarily the validity of a contract is to be determined by the law of the place where made, and the note before us having been made and specifically made payable in Iowa, its validity and the validity of its provision for interest is to be determined by the law of that state.—*Cockburn v. Kinsley*, 135 Pac., 1112; *Wolf v. Burke*, 18 Colo., 264-268, 32 Pac., 427, 19 L. R. A., 792; *Richman v. S. Omaha Nat. Bk.*, 76 Ill. App., 637; *Bigelow v. Burnham*, 90 Iowa, 300, 57 N. W., 865, 48 Am. St. Rep., 442; *Stickney v. Jordan*, 58 Me., 106, 4 Am. Rep., 251; *Pine v. Smith*, 11 Gray (Mass.), 38; *Long v. Long*, 141 Mo., 352, 44 S. W., 341; *Coad v. Home Cattle Co.*, 32 Neb., 761, 49 N. W., 757, 29 Am. St. Rep., 465; *Curtis v. Leavitt*, 15 N. Y., 9, 230, 296; 22 Cyc., 1476, and other cases there cited.

The decisions of the highest courts of the state of Iowa recognize the rights of the parties to contract there-

in for interest upon interest.—*Mann v. Cross*, 9 Iowa, 327; *Preston v. Walker*, 26 Iowa, 205, 96 Am. Dec., 140; *Burrows v. Stryker*, 47 Iowa, 477; *White v. Savery*, 50 Iowa, 515; *Ragan v. Day*, 46 Iowa, 239; *Carter v. Carter*, 76 Iowa, 474, 41 N. W., 168; *Fockler v. Beach*, 32 Iowa, 187. And in the case of *Sullivan v. German Nat. Bk.*, 18 Colo. App., 99-104, 70 Pac., 162, 164, it is held that “the courts of a state in cases where the laws of another state are involved, may and should take notice of the decisions of the highest courts in the latter jurisdiction on the law so involved.”

The instrument sued upon being made, and specifically made payable, in the state of Iowa, and being valid there under the decisions of the highest courts of that state, should be held enforceable in this state.

We feel that substantial justice has been done, and find no reversible error in the record, and, therefore, the judgment is hereby affirmed.

Decided December 8, A. D. 1913. Rehearing denied January 12, A. D. 1914.

[No. 3815.]

THE GERMANIA LIFE INSURANCE COMPANY v. KLEIN.

1. **LIFE INSURANCE—Construction of Policy.** The policy stated that the insurer agreed as afterwards set forth, “in consideration of the representations made in the application therefor, which is hereby made the basis of and a part of this contract.” Also it declared that “all the statements made in the application, and those contained in the declarations to the medical examiner, which with this declaration constitute an application to, etc., for insurance upon the life, etc., are offered to the said company as a consideration of the contract applied for,” and that the assured adopted each of these statements as her own, and warranted them to be “full, complete and true.” *Held* that not only the application proper, but all the other statements and declarations, by

whatever name called, were part of the contract, and the basis of the policy.

2. — *False Representations*, of a fact material to the risk, and upon which the policy is based, avoid it, even though such misrepresentations are the result of mistake, and made in good faith.

3. — *Representations Material to the Risk*. A representation that the applicant had never consulted a physician is material to the risk, when in fact there was such a consultation, not in respect to some temporary ailment, but to a serious malady of chronic character.

So a gross misrepresentation as to the age of the applicant defeats the insurance *pro tanto*.

4. *TRIAL—Directing Verdict*. Where, in an action upon a life policy, a material representation made by the insured, and declared to be the basis of the policy, is shown by uncontradicted evidence to be false, the question is not to be submitted to the jury.

5. *EVIDENCE—Deposition—Effect on Appeal*. The verdict of the jury is not conclusive in the court of review as to the veracity of a witness who testifies by deposition.

Appeal, from Pueblo District Court. HON. J. E. RIZER, Judge.

Mr. F. A. WILLIAMS, Mr. G. Q. RICHMOND, for appellant.

Mr. JAMES A. PARK, Mr. BENJ. F. KOPERLIK, for appellee.

KING, J., delivered the opinion of the court.

This was an action, brought to recover on a life insurance policy, in which the verdict and judgment were for the plaintiff.

On the 22nd day of September, 1905, Pauline Klein made written application to The Germania Life Insurance Company of New York for \$1,500 insurance on her life. Among other things, she stated that she was fifty years of age at her nearest birthday; a resident of the city of Pueblo, Colorado; had not had any of the diseases inquired of in the medical examination; had never

consulted a physician; had never removed to benefit her health, and did not contemplate a change of residence.

The application was accepted and policy issued at the home office in New York under date of October 19, 1905, and policy delivered to the insured at Pueblo about the last of October. Immediately thereafter she returned to Philadelphia, Pennsylvania, whence she had come during the previous June, and at which place she died on January 10, 1906. Death was caused by carcinoma of the gall bladder.

The defense to the action on the policy was, in substance, that insured had understated her age by thirteen years; that she had secured the insurance by false representations of facts material to the risk; that the statements and representations made in her application were warranties, and that there was a breach of such warranties.

The policy states that "The Germania Life Insurance Company of the City of New York in consideration of the representations made in the application for this policy, which application is hereby made the basis of, and a part of, this contract, and of the payment * * * does hereby promise and agree," etc. By this provision of the policy, it is plain that the application as a whole is made the basis of and a part of the contract. What constitutes the application is declared and agreed upon as follows:

"It is hereby declared and agreed that all the statements and representations contained in the foregoing application and those contained in the declarations made to the Medical Examiner, which, together with this Declaration of Agreement, constitute an application to The Germania Life Insurance Company of New York for an insurance upon the life of the undersigned Pauline Klein in the amount of fifteen hundred dollars, are offered to

the said Company as a consideration of the contract applied for; each of which statements and answers, whether written by his or her own hand or not, every person whose name is hereto subscribed adopts as his or her own, admits to be material, and warrants to be full, complete and true, and to be the only statements given to the Company in reply to its inquiries, and upon which, should the insurance applied for be granted, the Company's contract will be founded."

The application proper, including this declaration and agreement, and also the answers made to the questions asked by the medical examiner, were subscribed by Pauline Klein, so that by the express terms of both the policy and the application, all these statements, representations and declarations, by whatever name they may be called, became a part of the contract of insurance, and the basis upon which the policy was issued.

The evidence conclusively showed, and the jury found, that at the time of making the application, insured was sixty-three years of age at her nearest birthday, instead of fifty years of age as stated in her application, and for that reason the verdict was returned and judgment rendered for \$898.42, the amount of insurance which the premium actually paid would have purchased at the age of sixty-three years.

The evidence as conclusively showed that for at least four years before she made her application, the insured had been consulting a physician for some ailment or disease, and that from about April 4, 1904, to the time of her death, with the exception of the few months she resided or visited in Colorado, she had been treated for carcinoma of the liver. Dr. C. H. Lefcowitch, a practicing physician of Philadelphia, a graduate of Jefferson Medical College of that city, and for some years assistant surgeon to the Philadelphia Polyclinic Hospital, testified that he was physician for said Pauline Klein from Sep-

tember 12, 1901, to November 26, 1905; that prior to April 4, 1904, he had treated her at various times for gastro-intestinal derangement, and from said April 4th for carcinoma of the liver, and had been consulted by her just previous to her departure for Colorado; that upon return of the insured to Philadelphia he treated her from November 21st to November 26th, inclusive, for the same disease. From about December 1, 1905, to the time of her death she was attended by Dr. Fussell, assistant professor of medicine at the University of Pennsylvania, chief of the medical dispensary of and lecturer on diseases of the liver at that institution, and also physician to some hospitals in that city, a practicing physician of twenty-two years' experience. The disease was diagnosed by him as carcinoma of the liver, and so treated. However, an autopsy performed by him and his associates disclosed that the carcinoma was of the gall bladder, with secondary deposits or infiltration into the liver and duodenum; that the gall bladder was entirely destroyed, and that death ensued from carcinoma of that organ, instead of the liver; that what during life had been regarded as a malignant tumor of the liver was a prolapsed and prolonged lobe of that organ, projecting into the abdomen below the ribs, but it was not carcinomatous, at least until of a recent date, and not the cause of her death. The testimony of both Dr. Lefcowitch and Dr. Fussell was by deposition, and for that reason the verdict of the jury is not conclusive on this court as to the veracity of those two witnesses, even though it be conceded that the opinion of either of them as to the time the fatal disease originated conflicts with other opinion evidence.

The testimony of Dr. Lefcowitch that he had been consulted by and had treated the insured at various times for several years, and that for at least a year prior to the time her application for insurance was made had re-

garded and treated the disease as chronic carcinoma, is neither disputed by any other witness nor in any substantial respect discredited in the slightest degree. His veracity is in no degree impeached by the slight inaccuracy of his diagnosis. The fact of consultation was conclusively established, and the jury should have been so instructed.

Under this condition of the contract of insurance and of the evidence, the court instructed the jury that under the provisions of the policy the statements of Pauline Klein contained in the application, and her declarations to the medical examiner, were not warranties, but representations only, and, if false, would not affect the validity of the policy unless they related to statements material to the risk and were fraudulently made with intention to deceive; and unless they found that such false statement had been made with such intention to deceive, the verdict should be for the plaintiff; and also instructed the jury that, even though the statement that she had consulted no physician was false, the policy would not thereby be avoided, unless the jury further found that in making such statement she had not made the answer in good faith.

As we view the case, it is not necessary for us to determine whether the statements and declarations contained in the application are warranties, or representations only, as the latter term is used to distinguish statements and declarations that are express warranties from those which are not. For the purpose of determining this case, it will be assumed that by virtue of the clause in the policy which recites that "in consideration of the *representations* made in the application for this policy," the company "does hereby promise and agree," etc., the statements and declarations contained in the application are made representations, and not express warranties. A false statement or declaration of a fact material to

the risk, and upon which the policy is based, will avoid the policy, whether that misrepresentation be the result of intention or of mistake, and whether made in good faith or not so made. Such misrepresentation is as fatal to the policy as a breach of warranty.—1 May on Insurance, sec. 181; 3 Cooley's Briefs on Law of Insurance, pp. 1950a to 1954d; *Trav. Ins. Co. v. Lampkin*, 5 Colo. App., 177-183, 38 Pac., 335; *Sun Fire Office v. Wich*, 6 Colo. App., 103, 39 Pac., 587; *Des Moines Life Assn. v. Owen*, 10 Colo. App., 131, 134, 50 Pac., 210; *Nat. Mut. Fire Ins. Co. v. Duncan*, 44 Colo., 472, 476, 98 Pac., 634, 20 L. R. A. (N. S.), 340; *Northwestern L. A. Co. v. Tietze*, 16 Colo. App., 205, 64 Pac., 773; *Am. Bond & Trust Co. v. Burke*, 36 Colo., 49, 58, 85 Pac., 692; 2 Cooley's Briefs on Law of Insurance, p. 1166. The foregoing authorities, including the decisions of the highest courts of this state, we regard as conclusive on the proposition that if representations made in answer to specific questions material to the risk are untrue, the policy will thereby be rendered void, and that it is immaterial whether such answers be considered warranties or representations, or whether they were made with intention to deceive the insurer or without such intention.

In our opinion, no inquiry was made in the instant case, or can be made, more material to the risk and more essential to properly advise the company contemplating or considering the issuance of a policy, and which would more probably influence it in determining whether it would enter into the contract, than the question as to whether the applicant had consulted a physician, or what physician she had consulted. It is in evidence that this answer was relied on by the company in approving the application. If the applicant had truthfully answered that she had consulted and been treated by Dr. Lefcowitch, inquiry could have been made of him, and it will be presumed that the company would have been informed

that he had diagnosed her case as carcinoma of the liver and had so treated it, and there is little reason to doubt that such information would have so influenced the defendant in this case that it would have declined the application. It appears that the applicant had not been advised, by the doctor she consulted, of the gravity of her ailment or disease as diagnosed by him; but the fact of the consultation of a physician or its materiality does not depend upon the gravity of the subject of the interview as regarded by the patient; and while such a representation may at times be found and held to have been immaterial to the risk, and if false not prejudicial because the consultation was in fact, both from the viewpoint of the patient and of the physician consulted, for a merely temporary ailment, that fact cannot avail plaintiff in this case, where the materiality of the representation has been so fully and conclusively shown by the evidence. That statements to consultations of or attendance by physicians under such circumstances are material to the risk, and if false avoid the policy to the same extent as if they had been express warranties, is supported by both reason and authority.—25 Cyc., 801, 806; 2 Cooley's Briefs on Law of Insurance, p. 1166; *Metropolitan Life Ins. Co. v. Brubaker*, 78 Kan., 146, 96 Pac., 62, 18 L. R. A. (N. S.), 362, 130 Am. St. Rep., 356, 16 Ann. Cas., 267; 3 Cooley's Briefs on Law of Insurance, p. 2156a; *Rigby v. Metropolitan Life Ins. Co.*, 240 Pa., 332, 87 Atl., 428; *Owen v. Metropolitan Life Ins. Co.*, 74 N. J. Law, 770, 67 Atl., 25, 122 Am. St. Rep., 413; *Bryant v. Mod. Woodmen*, 86 Neb., 372, 125 N. W., 621, 27 L. R. A. (N. S.), 330, 21 Ann. Cas., 365; *Schwarzbach v. Ohio Val. Protective Union*, 25 W. Va., 622, 52 Am. Rep., 227; *Kasprzyk v. Metropolitan L. I. Co.*, 79 Misc. Rep., 263, 140 N. Y. Supp., 211; *Trav. Ins. Co. v. Lampkin*, 5 Colo. App., 177, 38 Pac., 335; 3 Cooley's Briefs on Law of Insurance, pp. 1953c, 1959; *Mattson v. Mod. Samaritans*, 91 Minn., 434, 98 N. W., 330.

There should be no deviation from this rule as to untrue answers in an application in regard to matters material to the risk and which are within the knowledge of the applicant.

The instruction that the false representation of a matter material to the risk would not avoid the policy, unless made with intention to deceive and defraud the insurer, was erroneous.—2 Cooley's Briefs on Law of Insurance, p. 1166, and cases cited. The contention made by appellee that this instruction was cured by another, or others, is untenable. That feature or phase of the first instruction was aggravated by other instructions, except in so far as the second instruction was diametrically opposed to and inconsistent with the first, and in so far as those two instructions are inconsistent and irreconcilable with each other, and one of them wrong, they make the instructions bad as a whole.

The representations as to her age and consultation of physicians were of matters presumably within the personal knowledge of the applicant (the first approximately), and were so grossly false that, whether attributed to ignorance so dense as to be almost incredible, or to an intention and design to deceive and defraud, being material, they constituted fraud in law. The first misrepresentation, by the terms of the contract, defeated the policy *pro tanto*, the other in its entirety.

In view of the conclusion we have reached, that a material false representation made by the insured to the insurer was shown by uncontradicted evidence, it was error to submit that question to the jury as a question in dispute.—*Des Moines Life Ass'n v. Owen*, 16 Colo. App., 60, 63 Pac., 781; *City of Denver v. Murray*, 18 Colo. App., 142, 70 Pac., 440; *Weston v. Livezey*, 45 Colo., 142, 100 Pac., 404; *Webster v. Rhodes*, 49 Colo., 203, 112 Pac., 324.

The judgment is reversed, and cause remanded with instructions to enter judgment for the defendant.

Reversed.

[No. 3891.]

SCHNEIDER ET AL. V. HURT ET AL.

1. **TAX TITLE**—*Sale to County—Subsequent Taxes.* One who purchases from the county a tax purchase certificate is not entitled to a deed until he has paid all taxes subsequently assessed upon the lands.

2. **LANDLORD AND TENANT**—*Tenant Acquiring an Adverse Title.* If the lands are sold for a tax which the tenant has covenanted to pay he cannot lawfully acquire the tax title.

And where he purchases from the county a certificate of sale for a tax which he was not under obligation to pay, he does not entitle himself to a deed, upon such sale, by the payment of the subsequent taxes which he has covenanted with his landlord to pay; because he pays these, and must pay them, not for himself, but for his landlord; whereas, to entitle himself to such tax deed, he must have paid said subsequent tax for himself alone.

3. **TAX TITLES**—*Sale to County—Assignment of Certificate.* Under chapter 143 of the Laws of 1893, and sec. 6 of chapter 4 of the Laws of 1894, where lands are purchased by the county, at tax sale, the treasurer may assign a certificate at any time after the sale is made, and the clerk, at any time within three years from the date of the sale.

The assignee must in either instance pay all taxes which are due and unpaid at the date of the assignment. If any such tax has been paid by the owner, or any third person, the assignee is not required to repeat the payment.

Error to the Saguache District Court. HON. CHAS. C. HOLBROOK, Judge.

Mr. M. W. PURCELL, Mr. JOHN I. PALMER, and Mr. SAM H. KINSLEY, for plaintiffs in error.

Messrs. GOUDY & TWITCHELL, and Mr. J. H. BURKHARDT, for defendants in error.

MORGAN, Judge.

Original opinion modified; rehearing denied.

Writ of error to the district court of Saguache County to reverse a judgment, in favor of the defendants, in an action, begun March 9, 1907, to quiet the title and to cancel a tax deed to a quarter-section of land, and to set aside a subsequent conveyance thereof by the grantee in the tax deed. The amended complaint charges that one of the defendants purchased a tax sale certificate of purchase for the land, from the county, and took a tax deed thereupon, during the life of a lease given by the plaintiff as lessor, to him as lessee of the said land.

The sole contention of the plaintiff in error is that the relation existing between the lessor and the lessee, *under the lease in this case*, destroys the validity of the tax deed and the subsequent conveyance made by the lessee, who took the tax deed, to the other defendant.

The lease was made January 16, 1899, and provides that the lessee shall pay for the use of the land from March, 1899, to March, 1903, the taxes for the years 1899, 1900, 1901 and 1902, and pay \$20 a year in cash, and keep the fences in repair, with the other usual provisions of an ordinary lease. The land was sold November 23, 1899, for the taxes of 1898, to the county, and the certificate of purchase was thereafter assigned to the lessee, on August 4, 1900, the same day that he paid the taxes for 1899, as provided in the lease. The tax deed was received and recorded on November 26, 1902.

The lessee did not agree to pay the taxes of 1898, to collect which the sale was made, and it is not necessary to decide, as requested by appellant, whether the mere existence of the naked relation of landlord and tenant would invalidate the tax deed, because of the appearance of certain facts and circumstances peculiar to this case, and to the lease, making it unnecessary to determine such

abstract and isolated proposition. This lease involves more than that naked relation. There is no conflict in the authorities that, if it is the duty of the tenant to pay the taxes for which the land was sold, he could not legally acquire the tax title on such sale.—24 Cyc., 94. He would not be permitted to take advantage of his own failure to do that which he agreed to do. *Nullus commodum capere potest ex sua injuria propria.*—Coke-Litt., 148. Neither can the tenant take advantage of his failure to perform any other obligation imposed upon him by his lease, to the detriment of his landlord.

Under the express terms of the lease in this case, the lessee was obligated to pay the taxes for the years 1899, 1900, 1901 and 1902, for *his landlord*, and, as he bought the certificate of purchase, aforesaid, from the county, he was required under the statute to pay, for *himself*, the taxes assessed and due and unpaid on the property since the date of the sale, as a condition precedent to his right to acquire such certificate.—*Carnahan v. Sieber Cattle Co.*, 34 Colo., 257, 260, 82 Pac., 592; *Barnett v. Jaynes*, 26 Colo., 279, 57 Pac., 703; *Empire Ranch & Cattle Co. v. Neikirk*, 27 Colo. App., 392, 394, 128 Pac., 468; *Empire Ranch & Cattle Co. v. Howell*, 23 Colo. App., 265, 129 Pac., 245. And until all taxes subsequent to the date of the certificate are paid, “the person taking the assignment of the certificate is not entitled to a deed.”—*De Ford v. Smith*, 23 Colo. App., 78, 80, 127 Pac., 453.

The lessee paid these subsequent taxes in his own name and interest, as alleged in the answer, and shown by the record.

Now, as it was his duty to pay these identical taxes for his lessor, he could not profit by a violation of that duty, and pay them himself, in his own interest, and for the purpose of obtaining his landlord's title to the land through a tax deed. He could not pay them in both capacities. The same maxim applies as above, and, “No

one can change his purpose to the injury of another." A species of estoppel arises. *Allegans contraria non est audiendus*. The lessee alleged in his answer that he had performed all the conditions of the lease that it was his duty to perform, and yet in the same pleading he asserts the validity of a tax deed founded upon his violation thereof, that is, the payment by him, for himself, of the taxes of 1899, 1900, 1901, and 1902, instead of for the lessor. A man will not be heard to "blow hot and cold" at the same time.—Broom's Legal Maxims, pp. 132 and 237.

On petition for rehearing, appellant contends that when the lessee purchased the certificate and took an assignment from the county clerk, under the act of 1894, (Sess. Laws 1894, p. 47), he then had all the rights of an original purchaser at the tax sale, and, therefore, was not required to pay any subsequent taxes. The portion of that section of the statute relied upon is as follows (italics mine):

"Any person may at any time within three years from the date of such certificate deposit with the treasurer of such county the total amount due upon such certificate, due and unpaid and interest thereon since the date of such certificate, whereupon the clerk of the county shall assign such certificate to such person, and the *treasurer shall give such person a receipt for any and all subsequent taxes and interest paid by such person and thereupon such person shall be entitled to all rights and privileges, the same as though he were an original purchaser at the tax sale. No taxes assessed against any lands purchased by the county under the provisions of this section shall be payable until the same shall have been derived by the county from the sale or redemption of such lands.*"

In the cases above cited the courts have construed this statute, as shown by my italics, to mean that *when*

the treasurer gives the receipt for subsequent taxes, *thereupon* and *thereafter*, the assignee has the rights of an original purchaser. Such construction is in harmony with the following part of the act of 1893 (Sess. L. 1893, p. 429), authorizing the treasurer to assign the certificate:

“Whenever any lot or parcel of land, interest therein, or improvement on land, shall be bid in by or for the county at any tax sale, pursuant to the provisions of this act and a certificate of purchase shall be made to such county therefor, the treasurer may sell, assign and deliver such certificate to any person who shall desire to purchase the same, upon payment to the treasurer of the amount for which such property was bid in by the county, with interest and penalties accrued thereon from the date of sale together with the sum of one dollar for making such assignment; also the taxes assessed thereon since the date of such sale, or for such sum as the board of county commissioners at any regular meeting may decide.”

Appellant contends that such construction in the first two cases above cited is *obiter dicta*: however this may be, it has been followed and approved; and construing these two statutes together, as done in *Lovelace v. Tabor M. & M. Co.*, 29 Colo., 62, 66 Pac., 892, such construction seems to be the only plausible one; and, therefore, it must be concluded that the treasurer may assign a certificate at any time after it is made, and the clerk, also, may make the assignment at any time within three years after its date, but, in either instance the assignee must pay the taxes on the land that have been assessed upon it, and are due and unpaid when the assignment is made, but, if the owner, or anyone else, has paid any of such subsequent taxes, the assignee would not be required to pay them again, as held in *Barnett v. Jaynes*, *supra*, that is, if the treasurer should accept payment without redemp-

tion from the sale in a case where the county held the certificate.

Furthermore, the lessee as heretofore stated, did actually pay these subsequent taxes (paying the 1902 taxes after the tax deed was recorded), and took the tax deed before the lease expired; and claimed the property as his own. In so doing he violated the terms of the lease, and took advantage of such violation: (1) by paying the taxes for his own benefit and appropriating to his own use and becoming the beneficiary of such payments, and (2) by not paying the taxes for the lessor, as part of the consideration for the lease, thus defaulting in his payments thereupon and hiding such default from the lessor through his duplicity.

Reversed and remanded with directions for the lower court to enter judgment for the plaintiffs in accordance with this opinion.

Reversed with Directions.

Decided December 8th, A. D. 1913. Rehearing denied, February 11, A. D. 1914.

[No. 3491.]

SCOTT v. WATKINS.

1. PRACTICE—*Judge Sitting at Chambers.* A judge sitting at chambers in one county has no authority to direct judgment in a cause pending in another county. The order is void.
2. VOID JUDGMENT—*Vacating.* The court may vacate a void judgment or order even though an appeal has been perfected therefrom.
3. APPEAL—*Effect.* A void judgment may be vacated by the court where it appears, though an appeal has been perfected therefrom.
4. PLEADINGS—*Answer—Separate Defenses.* Where distinct defenses

are set up in one paragraph of the answer the plaintiff should move for a rule upon defendant to state and number them separately.

5. — *What Must Be Specially Plead.* Where, to a bill to quiet title, the defendant pleads a tax deed, the plaintiff, if he would assail its validity, must, in the reply, set up the particular matters upon which he relies to invalidate it.

6. *LIMITATIONS—The Five-Year Statute* (Rev. Stat., sec. 5733) is not available as a defense to a bill to quiet title to lands.

7. *TAX DEED—As Evidence.* A tax deed regular upon its face is *prima facie* proof of the regularity of the sale (Rev. Stat., sec. 5730).

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

Mr. W. W. ANDERSON, Mr. R. H. GILMORE, for appellant.

Messrs. ALLEN & WEBSTER, for appellee.

HURLBUT, J., rendered the opinion of the court.

Action to quiet title, begun February 10, 1906, by appellant as plaintiff. The record shows that the fee simple title was in plaintiff unless extinguished by the tax deed upon which defendant's title is founded. A decree was entered in favor of defendant, the validity of which is involved in this appeal.

Only three propositions are discussed and relied upon by appellant in his brief: First, as to the action of the court in rendering judgment in chambers, in a county other than that in which the case was tried; second, as to the court's power to vacate a judgment previously rendered at the same term, after an appeal therefrom has been perfected; third, as to error claimed to have been committed by the court in denying plaintiff's motion to strike from defendant's answer a paragraph which pleads in effect the five years statute of limitations, sec. 3904, Mills' Annotated Statutes.

As to the first question, the record discloses that

trial was had to the court October 7, 1908, in Yuma County, the court taking the case under advisement; that thereafter, on December 7, 1908, the judge, at chambers in Sterling, Logan County, determined the issues, made his findings in favor of defendant, and ordered judgment entered thereon, all of which purports by the record to have been done in open court in Yuma County on the date last aforesaid, when, as a fact, the court was not in session. It also appears from the same record entry that the court was under the impression that both parties to the action had agreed that such findings and order for judgment should be shown by the record to have been found and entered in open court at Wray, in the county of Yuma. It further appears from another entry of the court, January 5, 1909, that the court had become possessed of knowledge that plaintiff intended to challenge the validity of the proceedings of December 7th, whereupon the court vacated the findings and order of that date, held the same for naught, and entered the findings and judgment upon which this appeal is based. In the judgment entry of December 7th it also appears that plaintiff, by his attorney, then and there duly excepted to the same, and prayed an appeal to the supreme court, which was granted and the bond fixed. The appeal was properly perfected.

Plaintiff now contends that under authority of *Scott v. Stutheit*, 21 Colo. App., 28, 121 Pac., 151, the entry of December 7th is null and void; that, plaintiff having perfected his appeal therefrom, the district court was thereby deprived of jurisdiction to further act in the case; and that the vacating order, and judgment of January 5th, are null and void. The case cited supports appellant's contention on the point that the judgment of December 7th is null and void, and were that the only judgment before us we would necessarily have to reverse it. Such

is not the case, however. We are considering only the judgment of January 5, 1909.

Without passing upon the question as to the general power of a court to amend, vacate or otherwise change a valid order or judgment previously entered by it at the same term in which such power is exercised, from which order or judgment an appeal had been perfected, we think in this case the court did not err in entering the judgment of January 5th, as both parties concede in their briefs that the record entry of December 7th is null and void. It is also a fair presumption that the court must necessarily have been of the same mind, or it would not have attempted to disturb it. The entry was lifeless and harmless. It settled no issue, did not establish in defendant any title to the premises, nor did it affect plaintiff's rights in any manner. It could not support any subsequent action of defendant based thereon. Had no appeal been attempted therefrom it still remained of no force or effect for any purpose. Plaintiff had a perfect right to ignore it and treat it as if it had never been made. We think the trial court was also warranted in so considering it and vacating it, so far as it had the semblance of a judgment, and was also warranted, at any time during the term, in rendering a valid judgment or decree founded upon the merits as disclosed at the trial. Under these circumstances we deem this question pressed by appellant as highly technical. He has had a full hearing upon the merits of the case, both in the trial court and on this appeal. It must be remembered that both the entry of December 7th and the judgment of January 5th were based upon the merits, the findings in both cases being in favor of defendant; that they were based upon the same trial, and were in all respects identical, with the exception that no formal judgment was entered on the findings and order of December 7th.

The next question raised by appellant for consideration pertains to the ruling of the court in denying plaintiff's motion to strike from defendant's answer the plea of the short statute of limitations above mentioned. This defense is found in the answer, but is not paragraphed as a separate defense. It is included in, and joined with, that part of the answer which pleads as a defense paramount title to the land in dispute, emanating from a certain recorded tax deed. No motion was made to have the defenses separately stated. Under this state of the pleading the motion to strike was made. The usual and better practice would have been a motion on behalf of plaintiff compelling defendant to separately state that part of the pleading under discussion, and then attack it by demurrer. However, the trial court may have considered the motion made as in effect a demurrer, and, if so, it erred in overruling the same. It was error for the court to treat the statute of limitations pleaded as a good defense to the action. The complaint simply states a cause of action to quiet title—nothing else. It alleges title and possession in plaintiff; that defendant claims some interest adverse to him, which interest is false and inferior to the title of plaintiff, and is a cloud upon the same; closing with a prayer that the title to the land be forever quieted in plaintiff. It has been repeatedly held, both by the supreme court and by this court, that this statute of limitations is not available as a defense in an action of this kind.—*Munson v. Marks*, 52 Colo., 553, 124 Pac., 187; *Carnahan v. Hughes*, 53 Colo., 318, 125 Pac., 116; *Empire R. & C. Co. v. Mason*, 22 Colo. App., 612, 126 Pac., 1129; *Beaver v. Cook*, 23 Colo. App., 199, 128 Pac., 878; *Poage v. Rollins*, 135 Pac., 990.

As above stated, the trial court fell into error in ruling the statute of limitations to be an available defense to the action, but we are satisfied that it was error without prejudice. The record conclusively shows that at the

trial defendant produced in evidence a tax deed good on its face, which deed she pleaded as her title. This extinguished plaintiff's title, unless he had proven vices existing in the tax deed not apparent on its face, but this he could not do in this case unless he had specially pleaded, in his replication, the particular matters which rendered the deed void. This he did not do. The court excluded certain rebuttal evidence offered for the purpose of showing a defective publisher's affidavit, assigning as the reason that the statute of limitations was a bar to the action. The evidence was properly excluded; not, however, for the reasons given by the court, but upon objection duly made that it was not within the issues. As we read the record, the obvious grounds warranting the judgment for defendant were that the court found the tax deed good on its face, and there being no allegations in plaintiff's pleadings challenging the validity of the tax deed for reasons other than those appearing on its face, such as the failure of the revenue officers to comply with the statute in their official acts culminating in the deed, evidence tending to show such failure on the part of the revenue officers was inadmissible. It is the settled law in this state, as declared by our supreme court, that if a tax deed is good on its face, objections *aliunde* will not be heard or considered, nor evidence in support thereof admitted, unless the party so objecting has alleged and pointed out in his pleadings the facts or proceedings which he claims render the deed void.—*Webber v. Wannemaker*, 39 Colo., 425 89 Pac., 780.

It may be observed that no question of amendment of pleadings is raised on this appeal, as was done in the Wannemaker case. In the latter, defendant asked leave at the trial to amend his pleadings, which was refused. In the instant case appellant did not ask to amend his replication, nor has he on this appeal suggested in any way that he was deprived of an oppor-

tunity to ask for such amendment by anything said or done by the trial court.

Appellant further contends that the pleadings formed an issue in the cause as to whether or not there had been such an advertisement of the tax sale, and publication of the list and notice thereof, as the law required, but we do not so find. In the absence of such issue, defendant's tax deed received in evidence at the trial, being good on its face, was *prima facie* proof that the property in question was advertised for sale in the manner and for the length of time required by law.—Sec. 5730, Revised Statutes 1908.

We have noticed all the points mentioned and discussed by appellant in his briefs and discover no reason why the judgment should not be affirmed.

Judgment Affirmed.

MORGAN, Judge, specially concurring:

I concur in the result of the majority opinion because no injustice is done thereby, as the original plaintiff permitted his land to be sold for taxes in 1894 and for twelve years thereafter took no action to recover it and even then sold the title with the suit to the substituted plaintiff, and furthermore, the only defect in the tax deed was a defective publisher's affidavit which might have been amended. Section 78, Mills' Ann. Code, provides that no judgment shall be reversed or affected because of a defect or error in the pleadings not affecting the substantial rights of the parties.

I think the foregoing reasons should be given for the affirmance instead of those upon which the majority opinion is based. That opinion establishes a precedent that may be used, sometime, to take a man's land away

from him, who has a good title thereto, and to give it to another who has no title, merely upon a question of pleading. The majority opinion closes a door against judicial discretion that ought to be left open. The opinion discloses that the plaintiff has title in fee simple, but for defendant's tax deed, which is void because of the defective publisher's affidavit, and gives the land to the defendant, and I think the opinion should disclose that, notwithstanding the apparent injustice, no substantial wrong has been done, because the tax deed could be made good by amending the publisher's affidavit. As the opinion is written, it not only holds that a plaintiff in an action to quiet title cannot prove any defect in a defendant's tax deed, pleaded in the answer, unless such defect is specially pleaded in the replication, but takes the position that no amendment will be permitted unless leave is asked in the lower court and error specifically assigned upon the denial thereof, even though, as in this case, the lower court never excluded the proof of such defect for the reason that it was not specially pleaded, but for another and erroneous reason. The lower court took under advisement the objection to the evidence of the defective affidavit together with the motion to strike the plea of the statute of limitations and did not rule upon the same until the final judgment was entered, and then, erroneously held that the plea of the statute was good, and stated in the findings, "Defendant's objection to the evidence offered is therefore *now necessarily sustained*." This excluded any amendment because it would be of no avail, and a request to amend would have been useless and would not have called the court's attention to anything that would have enabled it to correct its error. Objection was duly made and exception allowed to the findings of the court in excluding the evidence, and in holding the plea of the statute to be good, and error was duly assigned thereupon and thus the error of the lower

court is clearly before this court for its consideration. Every technical rule of pleading or practice so established is a barrier erected that impedes the progress and hinders the administration of justice, and oftentimes taxes the ingenuity of a just judge to its limits to leave such rules undisturbed and at the same time find an opening through which justice may enter and be administered, and the affirmance or reversal of a case based thereupon serves as an encouragement thereof.

Decided January 12, A. D. 1914. Rehearing denied, February 11, A. D. 1914.

[No. 3750.]

COLORADO & SOUTHERN RAILWAY COMPANY v. JENKINS.

1. **DAMAGES—Excessive—Remittitur.** Action for personal injury. Damages awarded in \$5,100. Order that plaintiff remit \$1,100, or submit to a new trial. Remittitur accordingly, and judgment for the residue. Affirmed on appeal.

2. — *Personal Injury.* An award of \$5,000 for an injury to a man of 45 years, actively engaged in business, the injury resulting in a permanent impairment of the use of an arm, is not excessive.

3. — *Evidence.* Action for personal injuries. The complaint alleged that plaintiff at the time of the injury was engaged in mining, merchandising, ranching, and banking. Evidence that for many years plaintiff had been in receipt of a salary named was held admissible.

4. **NEW TRIAL—Excessive Damages.** A verdict is not to be set aside merely because, in the opinion of the court, the damages awarded are excessive, nothing indicating that the jury were controlled by passion or prejudice.

5. — *Motion—Statement of the Ground.* Whoever applies for a new trial must distinctly advise the court, in apt time, of the ground of his application.

A reason not asserted in the motion, nor in the assignment of errors, upon appeal, nor in the opening brief, will be disregarded.

6. **APPEAL—Manner of Assigning Error.** That "the verdict and judgment are against the law, and the evidence insufficient to support the

verdict," is not a sufficient assignment of error to admit the contention that the verdict was the result of passion and prejudice animating the jury.

7. — *Brief.* An objection to the verdict, first asserted in the brief in reply, is not in time, and will not be considered.

8. NEGLIGENCE—*Pleadings.* A complaint against a common carrier of passengers for an injury to a passenger, alleging negligence generally and specific acts of negligence, is to be assailed only by a motion to separate.

Whether the plaintiff is required to prove the specific negligence charged, *quaere?*

9. — *Pleading Construed.* The complaint alleged that defendant "so negligently and unskillfully managed said railroad and train, and the car which plaintiff was riding * * * that at, etc., by reason of all said acts of negligence, said car was violently overturned and upset," *held* sufficient as a general allegation of negligence on the part of the carrier.

Appeal from Gilpin District Court. HON. CHARLES MCCALL, Judge.

Mr. E. E. WHITTED, Mr. H. A. HICKS, Mr. ROBERT H. WIDDICOMBE, for appellant.

Mr. JAMES M. SERIGHT, Mr. J. McD. LIVESAY, for appellee.

CUNNINGHAM, Presiding Judge.

Appellee, Jenkins, brought his action in the district court for damages growing out of injuries sustained by him while a passenger on defendant's road. Said injuries were the result of the overturning of one of defendant's passenger coaches in which plaintiff was riding. The jury returned a verdict in the sum of \$5,100 in favor of appellee. Appellant, in due time, filed its motion for a new trial and, after the same had been argued, the trial court entered an alternative order requiring appellee to remit \$1,100 of the verdict within forty days, or submit to the granting of appellant's motion for a new

trial. Within the time appellee elected to remit the \$1,100, and judgment was accordingly entered in his favor for \$4,000.

1. Counsel for appellant in their briefs and on oral argument strenuously insist that appellee's injuries were trivial, and in their reply brief, as well as on oral argument, it is urged that the judgment is excessive. Jenkins, at the time of his injury, was about forty-six years of age, actively engaged in various lines of business, among which was that of manager of a hardware company, which paid him for such services \$125 per month. The evidence discloses that he paid one doctor \$100 for his services, made necessary by the railroad accident out of which this case arises. Appellee testified, among other things, that he had not been able to do anything in and about the management of the hardware store since his injury, and that, "I have not been worth anything since; I have not earned my grub since," while the testimony of two physicians called on behalf of appellee tends to show that his injuries were serious, and of a more or less permanent character. One physician testified that shortly before the trial he had examined appellee and found that the movement of his arm or shoulder was very much limited, and that when pressed, a good deal of pain resulted therefrom; that a distinct *crepitus* or friction in the joint was discernible, and gave it as his opinion that this condition of appellee's shoulder was chronic, and that there was no likelihood of there being any change. This witness gave it as his opinion that certain of appellee's muscles had been, by the accident, torn from the bone. At the time of the trial, plaintiff submitted to an examination by the jury, and by doctors appointed by the court. The defendant offered no evidence whatever on the trial. Under this state of the record we cannot say that the judgment appealed from was excessive.

2. It is vigorously urged on behalf of appellant that

the trial court committed reversible error in requiring the plaintiff to enter a remittitur for \$1,100, or submit to the granting of a motion for a new trial. This contention is based largely upon the decision of our supreme court in *Tunnel M. Co. v. Cooper*, 50 Colo., 390, 115 Pac., 390, 39 L. R. A. (N. S.), 1064, Ann. Cas., 1912, 504, and the earlier case of *Davis Iron Wks. Co. v. White*, 31 Colo., 82, 71 Pac., 384. In the Davis case, the plaintiff had judgment for \$30,000, and the trial court required him to remit \$15,000, or one-half, while in the Tunnel Mining Company case the plaintiff had judgment for \$38,750, and was required to remit \$28,750, more than two-thirds of the verdict. We shall not prolong this opinion by quoting at any length from either the Davis Iron Works or the Tunnel Mining Company cases; both are accessible to the profession. It must be apparent to everyone that the size of the verdicts rendered in those cases, the amount which the trial court required the plaintiff in each case to remit, and the specific findings on the part of the supreme court that there was passion and prejudice clearly manifest in each of said cases, are sufficient in themselves to distinguish those cases from the case at bar. In the Davis Iron Works case, *supra*, Mr. Justice Campbell (p. 83) says:

“It conclusively appears from the record that the district court, in passing upon the motion for a new trial, held that the verdict was excessive, and that it was given under the influence of prejudice or passion of the jury, in which we concur.”

While in *Tunnel M. Co.*, *supra*, Mr. Justice Bailey (p. 401) says:

“Upon a full consideration of the entire record, with all inferences legitimately to be drawn therefrom, we reach the irresistible conclusion that, when viewed in the light of the facts and circumstances disclosed by the evidence, a verdict of such unusual proportions must

have been the result of the passion or prejudice, or of a total misconception by the jury of its duties and obligations under the law.”

And again, on p. 396:

“It was found that the verdict was excessive and a remittitur of nearly three-fourths of it was required. Such finding, although the judge may not have been able to say that the verdict was rendered as a result of such passion or prejudice, was, as a matter of law, a finding to that effect, and the verdict must be so treated.”

In the instant case there was no finding on the part of the trial court that the verdict was the result of passion or prejudice, and it may well be that the trial court, in ordering a remittitur of \$1,100 from a verdict of \$5,100, was moved solely by a belief that the verdict was simply excessive.

The authorities are believed to be practically unanimous that a verdict may not be set aside simply because the same is excessive, especially in states having code provisions similar to our own.

In *Tunnel Mining Co. v. Cooper*, *supra* (p. 393), it is said:

“It is apparent that trial courts here, under this provision [referring to the 5th ground for new trial of the Colorado Code] no longer have power to set aside verdicts because simply excessive, but can only do so when it is also found that the excess of award is due to passion or prejudice.”

To the same effect are: *Denver Co. v. Lawrence*, 31 Colo., 301, 73 Pac., 39; *Duncan v. Whedbee*, 4 Colo., 143; 18 Enc. Pl. & Pr., 125.

In *Davis Iron Works v. White*, *supra*, Mr. Justice Campbell, at p. 84, in referring to the case of *Sills v. Hawes*, 14 Colo. App., 163, 59 Pac., 422, makes this significant remark:

“Besides, there was no finding, either by the trial court or the court of appeals, that the largeness of the amount of the verdict was the result of any improper conduct by the jury.”

Our supreme court has said in *Rio Grande v. Heckman*, 45 Colo., 472-3:

“Another cause for a new trial assigned by defendant is that excessive damages appear to have been given under the influence of passion and prejudice. This cause is one of those set forth in sec. 217 of our code of Civil Procedure (sec. 236, R. S.). To warrant a new trial on this ground, it is plain that damages must not only be excessive, but it must appear that they were given under the influence of passion and prejudice.”

It was expressly ruled in *Sills v. Hawes, supra*, that the contention that a trial court had no alternative except to award a new trial, if it believes the damages given by the verdict of the jury to have been excessive, was unsound and against the “universal practice in this jurisdiction,” and while the opinion in that case may be said to have been modified, in some particulars, by the opinion in the Davis Iron Works case, the expression which we have just quoted from the Sills case was not modified. As we have already stated, there was no finding of the trial court in the case at bar that the jury was actuated by motives of passion and prejudice, and we think the record strongly indicates that such was not the case, for neither in its motion for a new trial, or in its assignment of errors, or yet in its opening brief, does appellant make any suggestion, certainly no suggestion of a direct or express character, that the verdict of the jury was so vitiated. We may safely assume that if there was anything in the conduct of the jury that tried this cause which, at the time of the trial indicated passion and prejudice, it would not have escaped the vigilant eye of appellant's counsel. Not until the incoming of appel-

lant's reply brief does it appear that this contention was raised. At the time the trial court made the alternative order requiring appellee to enter the remittitur or submit to a new trial, appellant appears to have entered no objection, and later, when appellee elected to remit, and judgment was rendered, it contented itself with the following exception: "The defendant excepts to the order denying motion for new trial; it also excepts to the judgment and entry thereof." It was the duty of counsel for appellant to advise the trial judge in apt time, and by clear objections, that they believed the verdict rendered was the result of passion and prejudice, if they did so believe, and to present to the trial judge, either at the time he made the order, or at some time before the judgment was entered, the authorities upon which they based their contention, to the end that the trial court might have an opportunity to correct its error, if it had committed one.

"Where the objection that the amount of the recovery is excessive is not made the basis of a motion for a new trial, it is not available on appeal. This is true although the evidence contained in the record of the appeal shows that the damages assessed were excessive, or although the evidence may not show that the amount of damages is correct. The doctrine stated is applicable regardless of how the excess may arise. Thus it applies in cases where the excess is caused by mere errors in computation, where a larger amount is awarded than is claimed in the petition or declaration, or where the recovery is excessive in awarding costs not properly taxable, or in improperly enforcing penalties."—29 Cyc., 750, and cases cited.

"Grounds not stated in the motion or written statement will not be considered at the hearing by the trial court. And equally it is held that on appeal or error the reviewing court will not consider any grounds other

than those specified in the motion. A party making a motion for a new trial is bound by the reasons assigned therein, and can urge no other on appeal. All matters which are grounds for new trial, and which are not set out in the motion are waived."—29 Cyc., 944, and cases cited.

3. Not only did appellant fail to include in its motion for a new trial any specific reference to the misconduct of the jury, but, in our judgment, the same failure characterizes its assignment of errors. It is true that in its assignment of errors appellant avers that: "the judgment and verdict are against the law; the evidence is insufficient to support the verdict; the judgment is contrary to the law and the evidence"; but we are not disposed to think these assignments sufficiently present the contention raised, for the first time, as we have heretofore said, in the reply brief of appellant, that the verdict is excessive and the result of passion and prejudice, since:

"Each error must be separately assigned. It is unambiguously stated in a very large number of decisions that each error relied on must be separately and distinctly specified—that no assignment shall embrace more than one specification of error—and that on a failure to comply with the requirement, the court will, as a general rule, refuse to consider the assignment."—2 Cyc., 986-7.

"Errors under the rules of this court must be separately alleged and particularly specified."—*Hanna v. Barker*, 6 Colo., 303; *Alexander v. Wellington*, 44 Colo., 388-392, 98 Pac., 631; *Marshall S. M. Co. v. Kirtley*, 12 Colo., 410, 21 Pac., 492.

"An assignment of errors is in the nature of a pleading, and, in a court of last resort, it performs the same office as a declaration or petition in a court of original jurisdiction. The object of an assignment of errors is to point out the specific error claimed to have been com-

mitted by the court below, in order to enable the reviewing court and opposing counsel to see on what basis the plaintiff's counsel intends to ask a reversal of the judgment or decree, and to limit the consideration to those points. It is a rule of general application, though subject to some exceptions, to be noted hereafter, that a reviewing court will not consider any errors except those assigned."—2 Cyc., 908; *Taylor v. Colo. Iron Works*, 33 Colo., 179, 80 Pac., 129; *Downing v. Ernst*, 40 Colo., 137, 92 Pac., 230; *Pettitt v. Mayhew*, 43 Colo., 274, 95 Pac., 939.

From the foregoing, it will be perceived that appellant not only failed to raise the question which we are now considering by objections and exceptions at the time the order and judgment of the trial court were entered, but failed in this respect in its motion for a new trial, and in its assignment of errors in this court, and lastly, it failed to discuss or make reference to the question in its opening brief in this court. Under such circumstances, we think it ought not now to be heard in this court to urge a reversal on the ground that the verdict is the result of passion and prejudice, even though it be granted that there is evidence in the record which would make it our duty to consider this contention, had it been timely interposed.—*Mesa De Mayo Co. v. Hoyt*, 24 Colo. App., 479, 133 Pac., 471; *Isabella G. M. Co. v. Glenn*, 37 Colo., 172, 86 Pac., 349.

4. Counsel for appellant say in their opening brief:

"One of the main contentions of the appellant in this case is that the appellee, having alleged specific acts of negligence in his complaint, which were put in issue by the answer, it became incumbent upon appellee to prove the same in order to recover; and that the proof adduced upon the part of appellee failed to sustain his allegations concerning the negligence alleged."

In other words, appellant insists here that there

were no allegations in the complaint in this case except allegations of specific negligence, and that there was no proof adduced upon the trial except proof of general negligence. It is frankly admitted on behalf of appellant that where negligence, in a case of this sort, is alleged both generally and specifically, the specific charges of negligence need not be established by proof, and that the doctrine of *res ipsa loquitur* applies, without the specific acts of negligence having been proven. Or, otherwise stated, a passenger who sustains injuries from the overturning of a car, for instance, has made a case when he proves the accident and the injuries resulting therefrom, and this he may do, where he has alleged specific acts of negligence in his complaint, providing he has also alleged negligence generally. The pertinent portion of the complaint in this case reads as follows:

“Said defendant, by its servants and agents, so negligently, carelessly and unskillfully managed the operation of said railroad, said train, and the coach in which plaintiff was riding, and also so negligently and carelessly permitted its roadbed and track to be out of repair and in a defective and dangerous condition that * * * by reason of all of said acts of negligence and carelessness, and by reason of the defective condition of said track * * * the said car in which the plaintiff was riding was suddenly and violently overturned,” etc.

In our opinion, in the quotation which we have just made from the complaint, negligence is plead both generally and specifically. It is true that the two methods of pleading negligence are not separated in different counts, but this is not necessary in the absence of a motion asking for a separation. In *Walters v. Seattle Co.*, 48 Wash., 233, 95 Pac., 419, 24 L. R. A. (N. S.), 788, it is said:

“In this case all that pertains to the particular cause of the accident could have been stricken out, and still

enough remained to have warranted a recovery. The particular cause of the accident was not, therefore, of the substance of the issue, and it was not necessary for appellant to prove it in order to recover, even though it was alleged. * * * But the plaintiff is not thereby deprived of the case or pleading and proofs made merely because she alleged a stronger case than she was able to prove.”

In support of this rule, the Washington court cites numerous cases. So here, in the case before us, the particular cause of the accident could have been stricken out and still a good cause of action would have remained. If the particular or specific acts of negligence which were charged in the complaint in the cause at bar had been omitted, the allegation would have read thus:

“The said defendant, by its servants and agents, so negligently, carelessly and unskillfully managed the operation of said railroad, said train, and the car or coach in which plaintiff was riding * * * that thereupon, at a point on the line of said railroad about one and a half miles east of a point known as Smith Hill Station, the said car in which plaintiff was riding was suddenly and violently overturned and upset,” etc.

It would be difficult to conceive of a more general allegation than this becomes after omitting the specific acts of negligence. We must not be understood as intimating that we concede the rule contended for by appellant, that where one alleges specific acts of negligence in his complaint it becomes incumbent upon him to prove the same in order to recover, even in cases where the doctrine of *res ipsa loquitur*, but for the specific acts of negligence plead, might be properly invoked by the plaintiff. The courts are not harmonious on this point, and we do not find it necessary to pass upon it in order to dispose of the case we are now considering. We call attention, however, to the case of *Klusha v. Yeoman*, 54

Wash., 469, 103 Pac., 821, 132 Am. St., 1121, where the rule contended for by appellant is discussed with ability and repudiated.

But, if it be conceded that the plaintiff in the case at bar alleged specific acts of negligence, and none other, still we are satisfied from the record that he offered proof of the specific acts of negligence which he averred. The specific acts of negligence plead pertain to the alleged defective and dangerous condition of appellant's road-bed, and there was proof given by the plaintiff, and two other witnesses called by him, said witnesses being passengers on the train at the time of the accident, tending to prove that the ties, at the point of derailment, were rotten and decayed, and that the coach in which plaintiff was riding probably left the track because of the defective condition of the ties. Our conclusion, therefore, is (a) that the plaintiff plead negligence generally; (b) that he offered proof in support of the specific allegations of negligence.

5. On the trial, over the objection of the defendant, plaintiff was permitted to testify that he was receiving, at the time of his injury, a salary of \$125 per month, and that for eighteen or nineteen years he had received such salary, as the general manager of a hardware company in which he was a stockholder. No attempt was made by plaintiff to prove a loss of profits from the hardware or any other business in which he was interested, other than the loss of his salary, *i. e.*, there was no attempt to show that because of his inability to attend to his duties as manager of the hardware company there was any diminution in the volume of business of that company. On the contrary, plaintiff testified: "My hardware business went along just the same as if I were there, and is running today." Appellant predicates its contention that the court committed reversible error in permitting plaintiff to testify as above set forth, on the case of *City*

of *Pueblo v. Griffin*, 10 Colo., 366, 15 Pac., 616. Evidently plaintiff's counsel had this case in mind at the time he was interrogating his client, for the question objected to is in the following language:

"Q. Now you may state how much you had been receiving at the time of your accident, and prior to the time of the accident, in that capacity (manager) personally for your services.

"A. I was receiving a salary of \$125 a month."

We are fully persuaded that the question was a proper one, and that the answer does not offend against the rule laid down in the *Griffin* case. The pleadings in the *Griffin* case and the character of the testimony as disclosed by the opinion, make it readily distinguishable from the pleadings, and evidence objected to, in this case. In the *Griffin* case, page 367, it is said:

"The testimony admitted went to show that from the *peculiar* habits, skill and industry of defendant in error he was able to earn more than if he had conducted his business on a more expensive scale, and had done the work of *one man only*, and hired two others, which in his business he states *it was usual to do*; but by dispensing with the labor and expense of two men, his *profits* were from \$75 to \$100 per month. Under a general averment, plaintiff might have shown what his business was, and its extent, together with his general ability to earn money, but it was inadmissible to show the *profits* of his business as a measure of damages. Proof of *profits* as a measure of damages in cases in which they are recoverable must be specially averred. In this case the *profits* of plaintiff's business, as shown by him, were not the result of the labor of plaintiff alone, but were at least in part composed of other elements, which from the uncertainties and fluctuating nature of such business could not be the basis of the estimation of damages in a case like this." (The italics are ours.)

In a much later case, *Union Pacific R. R. Company v. Shovell*, 39 Colo., 436, 89 Pac., 764, our supreme court used this language:

“It is not necessary to determine whether the damages claimed by plaintiff because of incapacity to work were general or special. The question simply is, do the averments of the complaint sufficiently advise the defendant that the damages are claimed because the plaintiff was incapacitated from work as the result of the wrongful act of the defendant? We think they do. It is alleged in effect that the plaintiff was unable to work from the time of the injury, and will, for a long time yet to come, be wholly incapacitated from performing any labor, and on this account, in connection with other conditions resulting from having his leg broken, he has been damaged in the sum claimed in the complaint. This certainly advised the defendant that damages were sought to be recovered because of plaintiff's incapacity to perform labor.”

In the *Shovell* case, the plaintiff did not, as the plaintiff in the instant case did, set forth his business or occupation, and commenting on Shovell's failure in this behalf, our supreme court said:

“Doubtless it would have been better pleading for the plaintiff to have set forth his business or occupation; but that was not necessary in the absence of a motion by the defendant to make his complaint more definite and certain in that respect.”

In the *Shovell* case we find, by examining the record, that the plaintiff was permitted to testify concerning the wages that he was able to earn.

No good purpose can be subserved by further quoting from the *Shovell* opinion, but we call especial attention to it, and to the very able discussion of the matter here under consideration by Mr. Justice Gabbert, and the authorities there cited. No claim was made on the part

of appellant, at the time this testimony was given, of surprise, nor is there any claim or contention made in this court that its counsel were surprised by the testimony which appellee gave as to his wages for eighteen or nineteen years, and right up to the time of the accident. The *Griffin* case is not only not opposed to the conclusions that we have here reached, but we think, when properly analyzed, is authority therefor, and it is cited by Mr. Justice Gabbert in support of the conclusion reached in the *Shovell* case. Counsel for the Railroad Company, in the *Shovell* case, instead of citing *Pueblo v. Griffin, supra*, in their briefs, devoted some space to distinguishing it, and admitted that the opinion in that case contained *obiter*, at least, from which plaintiff, Shovell, might draw some comfort. It would be difficult to conceive of a better or more satisfactory method of establishing one's general ability to earn money than by proving what he had been able to earn for nineteen years immediately preceding the time of the accident which resulted, as he contends, in his total incapacity to follow the business in which he was engaged. In his complaint the plaintiff alleged the nature and character of his business (a thing which Griffin, in the case relied upon by appellant, failed to do); that he was in the merchandising, mining, ranching and banking business. As our supreme court has stated in the *Shovell* case, *supra*, the only object or purpose of requiring specific allegations is that the defendant may not be taken by surprise, and it is difficult to comprehend how the defendant here could be surprised when its adversary was a man who, for eighteen years, had been engaged in a certain line of business at one of the important stations on its road, and especially when he advised them in his complaint as to the business in which he was engaged. Indeed, there could be no object in plaintiff alleging what his business

was, if he had no intention of introducing proof as to his earnings or his capacity to earn money.

The following authorities bear upon the matter here under consideration: *Rio Grande v. Rubenstein*, 5 Colo. App., 124, 38 Pac., 76; *Ehrgott v. Mayer*, 96 N. Y., 277, 48 Am. Rep., 622; *Luck v. City of Ripon*, 52 Wis., 201, 8 N. W., 815 (the last two cases being cited with approval in *U. P. v. Shovell*, *supra*); *Conner v. Pioneer Co.* (C. C.), 29 Fed., 629; *Fetter on Carriers* (1897), vol. 2, sec. 44; *Chicago & Erie R. R. Co. v. Meech*, 163 Ill., 305, 45 N. E., 390; *Joyce on Damages* (1903), vol. 1, 342; *Black's Law & Prac. on Accident Cases* (1900), sec. 232; *Sutherland on Damages* (3d Ed.), secs. 1246, 1247, and 421; *Collins v. Dodge*, 37 Minn., 503, 35 N. W., 368; *Sias v. Reed City*, 103 Mich., 312, 61 N. W. 502.

There are other matters referred to in the briefs filed in this case, which have received due consideration, but which do not appear to require special comment at our hands.

Perceiving no substantial error in the record, the judgment of the trial court is affirmed.

Judgment Affirmed.

Decided January 12, A. D. 1914. Rehearing denied, February 11, A. D. 1914.

[No. 3761.]

AUSTIN v. KING.

1. JUDGMENT—*Conclusive Effect*. The final judgment of a court having jurisdiction both of the subject matter and the person is conclusive upon collateral attack, even though shown to be erroneous.
2. CORPORATIONS—*Evidence of Domicile*. A treasurer's deed to a corporation described it as of a county named "in the state of New Jersey." The name not bearing the definite article prefixed, as required by our

statute (Rev. Stat., sec. 846), these circumstances were accepted as evidence of its foreign origin.

3. — *Foreign—Service of Process Upon.* A foreign corporation which was named as defendant in an action brought in Kit Carson county to quiet the title to the lands situate in that county had filed with the secretary of state a certificate designating one R as its agent upon whom process should be served. No such certificate had been filed in the office of the county clerk of Arapahoe county, where service was made, and it was contended that under sec. 38 of Mills' code (Rev. Code, sec. 40) this service was insufficient. In view of the provisions of Mills' Code, sec. 39 (Rev. Code, sec. 43), Mills' Stat., sec. 499 (Rev. Stat., sec. 917), Mills' Stat., sec. 506 (Rev. Stat., sec. 856), and sec. 10 of article XV of the constitution, it was *held* that the action was properly brought in the county of Kit Carson, and that the service was sufficient to sustain the decree against the collateral attack.

4. *MAXIMS—One Shall Not Have Advantage of His Own Wrong.* A foreign corporation which files with the secretary of state a certificate naming a particular person as its agent to receive service of process is affected by service upon such person. It will not be allowed advantage of its failure to file the certificate with the county clerk, as required by Rev. Stat., sec. 917.

Appeal from Kit Carson District Court. HON. W. S. MORRIS, Judge.

Mr. LOUIS VOGT, for appellant.

Mr. JOHN F. MAIL, for appellee.

MORGAN, Judge.

Appeal from a decree of the Kit Carson district court, quieting title in the plaintiff, based upon two tax deeds issued to his grantor upon a sale for the taxes of the years 1892 and 1893, respectively, conveying a quarter-section of land. The defendant pleaded a latter tax deed for the land, and also a decree of the county court of that county quieting his title based upon the later deed, which he contends defeats the plaintiff's title.

The deed and decree, pleaded, are subsequent to the plaintiff's tax deeds, and, if valid, extinguish plaintiff's

title. The deed is void on its face, and appellee contends that this, and lack of valid service on the Municipal Debenture Company, one of the defendants in that suit, and plaintiff's grantor, makes the decree void. Now, the invalidity of this deed, even on its face, would not affect the jurisdiction of the court over the subject-matter in that suit, and it must have found, from the evidence necessary to justify a judgment by default, that the plaintiff's title was then sufficient. This deed should have been attacked in that suit. Whatever that court did, in the exercise of jurisdiction, in that suit, cannot be questioned here.—*Mortgage Trust Co. v. Redd*, 38 Colo., 458, 464, 88 Pac., 473, 8 L. R. A. (N. S.), 1215, 120 Am. St., 132; *Jackson v. Larson*, 24 Colo. App., 548, 136 Pac., 81. It will only be necessary, therefore, to determine whether that court had jurisdiction, by valid service, over the person of Municipal Debenture Company. Service was made in Denver County upon C. E. Rich, as the agent of that company, and it is admitted that, at the time, there was "a paper on file in the office of the secretary of state, filed by that company, which designated Rich as its agent," and that "no such paper was on file in the office of the county clerk in what was then Arapahoe County."

Appellee now contends that there is nothing in the record to show whether this company was a domestic or a foreign corporation, and that, whether one or the other, the service was insufficient under section 38, Mills' Ann. Code. Both tax deeds issued to that company, however, describe it as "of the county of Hudson in the state of New Jersey"; and in objecting to the decree in the lower court no contention was made that said company was or was not a foreign corporation, and the word "The" is not part of the corporate name, as required of domestic corporations by our statute. In the absence of any other evidence it is concluded it was a foreign corporation.

And as that company filed a paper with the secretary of state in which it designated C. E. Rich as its state agent, service upon him was sufficient, even though made in Denver county, and not made in the county where the suit was brought, and although no paper was on file in the office of the county clerk of Denver, once Arapahoe, county. The foreign company cannot take advantage of its own fault or neglect in not filing the appointment in the office of the county clerk, or in not designating an agent or maintaining an office in the county where its land was situated.

Section 38, aforesaid, enacted in 1891, amending the code provision of 1887, says that service on a foreign corporation doing business in this state, shall be made upon its agent, "found in the county in which the action is brought," and if no such agent is found in such county, upon any stockholder found in such county; but at the same time the following was enacted:

"All acts or parts of acts inconsistent with the provisions of this act are hereby repealed; but nothing herein contained shall be held to repeal any provision of law, now in force which authorizes or permits a summons to be served in any other county of the state, than that in which the action is brought."

And a law was then in force, sec. 39, Mills' Ann. Code, providing that, "When there are several defendants residing in different counties, a separate summons may be issued to each county, for the service of the defendants residing therein."

And another provision, sec. 506, M. A. S., saying that:

"In suits against any corporation, summons shall be served in that county where the principal office of the corporation is kept or where its principal business is carried on, * * * and if no such person can be found in the county where the principal office of the corpora-

tion is kept, or in the county where its principal business is carried on, to serve such process upon, a summons may issue from either one of such counties, directed to the sheriff of any county in this state where any such person may be found, and served with process. If such corporation keeps no principal office in any county, and there is no county in which the principal business of such corporation is carried on, then suit may be brought against it in any county where the above-mentioned officers, or any, or either of them, may be found. *Provided, that the plaintiff may, in all cases, bring his action in the county where the cause of action accrued.*" (Italics mine.)

The constitution further provides that:

"No foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the same, *upon whom process may be served.*"

And another provision following this constitutional requirement says, sec. 499, M. A. S., that:

"Foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate signed by the president and secretary of such corporation duly acknowledged with the secretary of state, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state residing at its principal place of business upon whom process may be served."

Now, from the foregoing provisions, it is concluded that the suit was properly brought in Kit Carson County where the land was situated, and that, as the defendant was a foreign corporation, and had designated an agent upon whom process might be served, by a filing in the

secretary of state's office, service on such agent would be sufficient in this instance, where the decree obtained on such service is collaterally attacked.

It is true it is held in *Venner v. Denver Union Water Co.*, 15 Colo. App., 495, 63 Pac., 1061, that the return of service should show that no agent could be found in the county where the suit was brought, in order to make valid a service upon a vice-president, but this conclusion was upon the premise that a vice-president is not an agent; but in *Venner v. Denver Union Water Co.*, 40 Colo., 212, 90 Pac., 623, 122 Am. St., 1036, the supreme court held that a vice-president is an agent of the corporation, and that service upon him was sufficient in that case.

Furthermore, there is no contention here that the return should show that no agent or stockholder could be found in the county where the suit was brought, but the contention is that service could be made only upon an agent or stockholder in the county where the suit was brought.

Although it appears, now, in the present case, that the tax deed on which the decree, pleaded, was based, is void on its face; and also that the land was vacant when said decree was made; yet, neither of these defects appear in the judgment roll or the decree in that case, but, on the contrary, the complaint alleges ownership and possession and the decree is valid on its face; therefore, that court, having jurisdiction of the subject-matter and of the person, its decree was a good defense in the present case, as the defendant in this case purchased the land from a grantee of the plaintiff in that, and is not charged with any notice or knowledge of any defect in the title not appearing in the decree or judgment roll aforesaid.—*Jackson v. Larson, supra*.

The judgment is reversed.

[No. 3795.]

CRISTLER V. BEARDSLEY.

1. **STATUTES—*Construed.*** Under the Revenue Act of 1901 (Laws 1901, c. 94) all taxes become due and payable when the tax warrant was delivered to the treasurer; and the ultimate date of such delivery was the first of January next succeeding the levy.

2. **LIMITATIONS—*Payment of Taxes.*** One claiming the benefit of the seven years' limitation (Rev. Stat., secs. 4089, 4090) can not avail himself of the payment of a tax which, though not delinquent, was payable at the date when he acquired color of title. Seven full years must elapse between the first payment of taxes which became due and payable after color of title was taken, and the institution of an action by the paramount owner.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. CHALKLEY A. WILSON and Mr. ASHER B. WILSON, for appellant.

Mr. E. K. ROBINETT and Mr. ISAAC PELTON, for appellee.

BELL, J.

This action was brought July 1, 1910, in the district court of Washington County, under sec. 255, Mills' Ann. Code, to quiet the title to the N. W. $\frac{1}{4}$ of Sec. 19, Twp. 3 N., R. 49, in Washington County, Colorado. The appellee, defendant below, answered, and exhibited his alleged title, a pretended treasurer's tax deed, which was void upon its face and admitted in evidence only as color of title. He also set up the five and seven years statutes of limitations and a payment of taxes under the seven years statute under claim and color of title made in good faith continuously for seven successive years, and also set up other defenses not material to consider herein. The case was tried to the court without a jury, and resulted in quieting the title of the appellee.

At the trial the appellee neither tendered nor introduced any proof, except his color of title and the payment of taxes assessed against said premises from 1901 to 1909, both inclusive, the first payment being made July 19, 1902, and admitted in evidence over the objection of appellant, and the last being made March 17, 1910.

The tax deed relied upon and the payment of taxes thereunder were governed by the statute of 1901, then in existence. Sec. 121, page 303, of this act provides that, as soon as practicable after the taxes are levied, and at the furthest on or before the 1st day of January, annually, the tax list and warrant shall be delivered to the treasurer commanding him to collect said taxes; sec. 10, page 242, provides that, on or before the last day of February, one-half of all taxes shall be due and payable, and the other half shall be due and payable on or before the last day of July of the year following the one in which they were assessed; sec. 11, page 243, makes the first installment of one-half of the taxes delinquent on March 1st, and assesses a penalty against such delinquent installment of 1 per cent for each month or fractional part thereof until paid, and makes the other half delinquent on August 1st; and additional penalties are imposed by the act for the non-payment of all taxes on or before the last mentioned date. It was seemingly the intention of the legislature to make all taxes due and payable from the time the tax list and warrant were delivered to the treasurer, and to fix the ultimate date of such delivery as of January 1st after the levy, and from this date the treasurer was commanded to collect said taxes. Therefore, the taxes assessed for 1901 against the property described in the complaint were due and payable, though not delinquent, at the date of the tax deed herein relied upon by appellee as color of title, and he cannot be permitted to take advantage of such due and unpaid taxes for the purpose of making one of the annual payments

under the seven years statute in perfecting his title. The deed was dated January 3, 1902, and the first payment that was admissible in evidence was the one made July 28, 1903, for the taxes assessed for the year 1902. Between the date of this payment and the date of the commencement of the action, July 1, 1910, but six years, eleven months and three days had expired, and, therefore, the statute of limitations had not so operated as to ripen the title in the appellee at the time suit was brought. Seven full years must elapse between the date of the first payment of taxes that have become due and payable after the color of title is taken and the date of the institution of the suit to recover the land.—*Empire Co. v. Howell*, 22 Colo. App., 584-599, 126 Pac., 1096; *DeFord v. Smith*, 23 Colo. App., 78-80, 127 Pac., 453.

Under the above cited authorities, we think the trial court erred in admitting proof of the payment of the 1901 taxes, and, therefore, the judgment must be, and is hereby, reversed and the case remanded, with instructions to the trial court that it set aside the decree and judgment heretofore entered in behalf of appellee, and enter judgment in behalf of appellant; upon condition, however, that the appellant, within a reasonable time to be fixed by the trial court, shall pay into court, for the use and benefit of appellee, the taxes heretofore paid on the land under the tax certificate and void tax deed, the statutory interest and penalties thereon, together with the costs of suit.

Reversed and Remanded.

[No. 3797.]

BROWN ET AL. V. WHETSTONE ET AL.

1. EVIDENCE—*Burden of Proof.* Whoever assails the validity of a decree of a court of record has the burden of proof.
2. JUDGMENT—*Jurisdiction of the Person—Constructive Service of Process*, complying with the statute, is as effectual as personal service.

That the published summons did not come to the notice of the defendant therein is unimportant. A decree quieting title to lands upon such service is not to be impeached and annulled by evidence *aliunde* the record that the plaintiff in the action had no title.

Appeal from Logan District Court. HON. H. P. BURKE, Judge.

Mr. JOHN F. MAIL, for appellants.

Messrs. MUNSON & MUNSON, for appellees.

KING, J., delivered the opinion of the court.

Appellants brought their suit to cancel certain deeds, a mortgage, and a county court decree purporting to quiet title in the defendants herein to certain lands in the county of Logan, which plaintiffs alleged were clouds upon their title to said lands. At the conclusion of the evidence offered by plaintiffs, the court rendered judgment for the defendants, holding that plaintiffs had failed to prove their cause of action.

Plaintiffs' title depends upon the validity and effect of a sheriff's deed which they claim divested the title of defendants' grantor and vested it in the grantor of plaintiffs. Defendants' title depends upon the validity and effect of a decree of the county court sought to be annulled, and which was rendered long after the date and record of the sheriff's deed. If valid, the decree quieted the title as against the said sheriff's deed. The burden of proving the invalidity of the decree was on plaintiffs. The records offered by them showed that the county court rendering the decree had jurisdiction of the subject-matter, and obtained jurisdiction of the defendants in that case (plaintiffs in this) by publication of summons, and rendered the decree in the exercise of jurisdiction so obtained. Plaintiffs sought to avoid the force and effect of said decree by showing that the defendants in that suit did not have actual knowledge of its pen-

dency, and, by the sheriff's deed, that the plaintiff in that suit had no title to quiet.

A decree rendered in the exercise of jurisdiction acquired by constructive service of summons made in compliance with law is as unimpeachable as if made upon personal service, and evidence that the published notice did not in fact come to the knowledge of the defendants is neither material nor competent under the issues made by the pleadings.

The attempt to impeach and annul the decree by showing *aliunde* the record in that case that the evidence upon which it was rendered was insufficient, or that plaintiff in that suit had no title to quiet, because extinguished by prior sheriff's deed, was ineffectual. The deed for that purpose was incompetent and insufficient. That instrument and its effect were necessarily in issue in the former suit, and as against it the title of defendants here was quieted, and it cannot avail the appellants.—*Mortgage Trust Co. v. Redd*, 38 Colo., 458, 88 Pac., 473, 8 L. R. A. (N. S.), 1215, 120 Am. St., 132; *Medina v. Medina*, 22 Colo., 146, 43 Pac., 1001.

The judgment is affirmed.

Affirmed.

[No. 3799.]

MATHERS ET AL. V. BARDWELL.

Judgment affirmed, being sustained by sufficient evidence.

Appeal from Denver District Court. HON. GEORGE C. ALLEN, Judge.

Messrs. VAN CISE, GRANT and VAN CISE, for appellants.

Messrs. HUGHES & DORSEY, Mr. BARNWELL S. STUART, for appellees.

Per Curiam.

We have examined the entire record in this case with care. The controversy presented in the briefs and on the trial below springs entirely from the fact that the plaintiff plead one contract, and relied thereon, while the defendants, in their answer, set up an entirely different contract, and sought, by way of counter-claim (which, but for the contract that defendants averred, they would clearly not be entitled to) to recover damages from the plaintiff. All of the differences between the parties can be fairly ascribed to this situation. Plaintiff's proof was sufficient to support the judgment which the trial court, without a jury, rendered in his behalf. To demonstrate the correctness of the foregoing conclusions would require an analysis of the pleadings, for which we can perceive no justification.

The judgment of the trial court is affirmed.

[No. 3821.]

DENNIS GIBBONS CONSTRUCTION COMPANY ET AL. v. RUBIDGE.

NEW TRIAL—Finding Not Supported by Evidence. The trial court, in estimating the plaintiff's damages, accepted and acted upon the testimony of a particular witness, which was not only vague, indefinite, and unsatisfactory, but was opposed to all the other testimony heard. The judgment was reversed.

Appeal from Denver District Court. HON. H. C. RIDDLE, Judge.

Mr. JOHN H. REDDIN and Mr. PATRICK D. CONNOR, for appellants.

Mr. CARL H. COCKRAN, for appellee.

Per Curiam.

By the frank and commendable concessions of both counsel, this appeal presents but one question, and that

purely one of fact. The construction company excavated and removed from vacant lots belonging to Rubidge a quantity of sand and gravel, to be used in the construction of a sewer. Rubidge brought suit and obtained judgment against the construction company and Gibbons, its president, for \$1,250.25. The market value of the gravel and sand per yard was a disputed question. The trial judge adopted the highest valuation placed upon it by any witness. The quantity of the gravel taken was likewise in dispute on the trial, and the trial court, in its findings, announced that it would adopt the testimony of one Noonan on that point, and if Noonan's testimony had been definite and certain, it would be our duty to affirm this judgment, notwithstanding the fact that his figures, as to the quantity and as to the price, were the largest given. But Noonan's testimony as to the amount of gravel removed was indefinite, uncertain, and wholly unsatisfactory. The excavation, it was conceded by all the witnesses having any knowledge on that point, extended into the public street, and the plaintiff below, appellee here, makes no claim, as indeed he could make none, for the gravel and sand taken by the construction company from the street. Various witnesses—two or three of them civil engineers who had made surveys—testified that the excavation extended into the street, and gave the distance it so extended. One of these engineers was a witness for the plaintiff, Rubidge. He testified that 653 cubic yards of gravel taken came from the street and alley, and but 975 cubic yards were taken out of the lots. But the court allowed the plaintiff for 1,667 cubic yards taken from the lots. This was almost the exact quantity which the engineer called by the plaintiff testified was taken from both the lots of the plaintiff and the street and alley. The unsatisfactory and indefinite character of Noonan's testimony is illustrated by the following, taken from the abstract:

"I should judge the pit was seven or eight feet deep. I never measured it.

"Q. By reason of your experience, could you make an estimate of the amount in cubic yards of sand or gravel taken out of this pit?

"A. No, I would not make an estimate at all. * * * I do not know how far into the street the pit extended. Cannot say that the 100 by 75 was all upon the lots."

From the foregoing, it is plain that the trial court erred in adopting the testimony of Noonan, and rejecting the testimony of all the other witnesses on the question of the amount of gravel and sand which had been excavated from the premises owned by the plaintiff, and the judgment must, for that reason, be reversed.

Judgment Reversed.

[No. 3894.]

McCord Mercantile Company v. McIntyre.

TAXES—*What Are Imposed Upon the Grantor of Lands.* Under Rev. Stat., sec. 5703, one who conveys lands between the 30th of June and the first of the succeeding January is liable, there being no express agreement to the contrary in the conveyance, for irrigation district taxes previously assessed.

Error to Otero District Court. HON. C. S. ESSEX, Judge.

MESSRS. HARTMAN & BALLREICH, CHARLES W. O'DONNELL, for plaintiff in error.

MR. FRED A. SABIN, for defendant in error.

CUNNINGHAM, Presiding Judge.

On or about August 7, 1907, plaintiff in error, as defendant below, conveyed by warranty deed to defendant in error, plaintiff below, certain lands in Otero County. The instrument of conveyance contained no

express agreement, nor was there any agreement, as to whether grantor or grantee should pay taxes that might be assessed upon the land conveyed for the year 1907. The land in question was situated in an irrigation district organized, presumably, under the statutes of our state, which were adopted first in 1901, and re-adopted, with certain amendments, in 1905. This act will be found at page 910 *et seq.*, Revised Statutes 1908, and in Mills' Annotated Statutes, revised edition, 1912, at page 1728 *et seq.* Section 5703, R. S. 1908, provides that:

“As between the grantor and grantee, where there is in the instrument of conveyance no express agreement as to which shall pay the taxes that may be assessed on the land conveyed, if such conveyance has been made between the 31st day of December and the 1st day of the next July, then the grantee shall pay the tax for the year in which the conveyance is made, but if the conveyance is made between the 30th day of June and the 1st day of the next January, then the grantor shall pay the taxes for the year in which the conveyance is made.”

It will be seen from the date of the conveyance involved in the case before us that it was made at a time and under circumstances which made the grantor liable, under the statute, for such taxes as had been assessed on the land for the year 1907, and contemplated by section 5703.

1. There had been assessed on the land conveyed, certain irrigation district taxes. These the grantor refused to pay, and plaintiff, after permitting the land to be sold for the taxes, redeemed the same from the tax sale and brought suit to recover the irrigation district tax. By their pleadings, their stipulation of facts upon which the case was tried, and in their brief, counsel have limited this court strictly to the consideration of but one question, *viz*: Does section 5703, *supra*, apply to irrigation district taxes? The record shows that the instru-

ment of conveyance was a warranty deed, but the deed is not set up in the pleadings, nor was it introduced in evidence, and we have no information as to the nature and character of its covenants, other than that it is denominated in the record as a warranty deed, but under the scope of our inquiry, limited as above stated, the covenants of the warranty deed are not important.

Neither counsel for plaintiff nor defendant in error have directed our attention to any case of a similar character, or to any authority directly in point, and we have been able, after vigilant search, to find but one, *viz.*, *Tull v. Royston*, 30 Kans., 617, 2 Pac., 866. Kansas has a statute very similar to our section 5703, and like our section, it is found in the General Revenue Law, or as the act is termed in the Kansas statute, "An Act to Provide for the Assessment and Collection of Taxes." In *Tull v. Royston*, *supra*, in considering the question here before us, Chief Justice Horton expressly ruled that their statute, similar to our 5703 and governing the liability, as to taxes, of the grantor and grantee, applied to taxes levied by a city or town for sidewalk improvements. At p. 868, Judge Horton says:

"While special assessments for improvements in cities are not taxes within sec. 1, art. 2 of the constitution, yet we must construe them to be included in the word taxes in sec. 86, p. 107, Laws 1879"—being the section that corresponds to our 5703.

The Kansas court, in construing its statute governing the liability for taxes as between grantor and grantee said, in the *Tull* case, *supra*:

"In construing these sections, the intention of the lawmaker must control, and this intention is to be ascertained from all that is expressed in the statute, rather than from the technical significance of the word 'assessments.' Section 43c, 19a, Comp. Laws 1879, relating to cities of the third class, favors this construction [mean-

ing the construction holding the conveyance statute applicable to sidewalk or improvement taxes] which reads: 'All taxes and assessments levied under authority of this act shall be placed on the tax roll for collection, subject to the same penalties and collected as other taxes are by law collectible.' "

Thus it will be seen that the Kansas court considered the fact that the legislature of that state, by making the general machinery for the collection of taxes applicable to the town improvement tax, thereby indicated their intention or purpose of making no distinction as between improvement and general taxes, in so far as the conveyance statute is concerned. With equal, if not greater, reason, we may rely upon sec. 3461, R. S., of our irrigation act, which reads as follows:

"The revenue laws of this state for the assessment, levying and collection of taxes on real estate for county purposes, except as herein modified, shall be applicable for the purposes of this act, including the enforcement of penalties and forfeitures for delinquent taxes."

2. It will be observed that the Kansas supreme court had before it a sidewalk tax case. We think, for reasons which we shall now proceed to give, there is a stronger reason for holding that irrigation district taxes should fall within, and be governed by, the section pertaining to conveyances than sidewalk taxes. Our irrigation district act is modeled upon, and is substantially similar to, the California Wright Irrigation District Act of 1887, and in all substantial particulars is the same as the California statute.—*Anderson v. Grand Valley Ir. Dis.*, 35 Colo., 527, 85 Pac., 313.

In adopting the act of California, we adopted the construction which the courts of that state had theretofore placed upon it. The supreme court of California has frequently ruled that an irrigation district created under its act was a public corporation.—*Turlock Ir. Dis.*

v. Williams, 76 Cal., 360, 18 Pac., 379; *Central Ir. Dis. v. De Lappe*, 79 Cal., 351, 21 Pac., 825; *Crall v. Poso Irr. Dist.*, 87 Cal., 140, 26 Pac., 797; *In re Bonds of Madera*, 92 Cal., 296, 28 Pac., 272, 675, 14 L. R. A., 755, 27 Am. St. Rep., 106; *People v. Turnbull*, 93 Cal., 630, 29 Pac., 224.

The supreme court of Nebraska appears to have taken a similar view. See *Board of Directors of the Alfalfa Ir. Dis. v. Collins*, 46 Neb., 411, 64 N. W., 1086.

The United States supreme court has followed the ruling of the California supreme court. See *Fallbrook Ir. Dis. v. Bradley*, 164 U. S., 122-159, 41 L. Ed., 369, 17 Sup. Ct., 56.

Other courts, under corporations organized for a somewhat similar purpose, are in accord with the views of the California court.—*Mound City L. Co. v. Miller*, 170 Mo., 240, 70 S. W., 721, 60 L. R. A., 190, 94 Am. St., 727; *Weil's Water Rights* (2nd ed.), sec. 429.

If these irrigation districts, when formed, are public corporations as the California court had ruled, for reasons clearly pointed out by Mr. Wiel in his work, at the section above indicated, then the taxes levied under them, or by virtue of the statute creating them, are public, and fall within the purposes of our general revenue bill, as expressed in the first section thereof, which reads:

“That for the support of the government of the state, and the payment of the public debt, *and the advancement of the public interest*, taxes shall be levied as hereinafter provided.”

3. Counsel for plaintiff in error contend that taxes levied under the irrigation district act are special, and not general, taxes. Indeed, the act itself so designates them, the last sentence of sec. 3459, R. S., reading:

“All taxes levied under this act are special taxes.”

But special taxes may be, and frequently are, public taxes as well; that is, taxes levied for a public purpose.

And frequently the term "special" is used simply as a designation, or for the purposes of classification. Our school tax is denominated a special tax, but it cannot be contended that the school tax is not a public tax. The authority for levying the special irrigation district tax is the same as the authority for levying the general public revenue tax, *i. e.*, it proceeds from the same source.

"Taxes are pecuniary charges imposed by the legislative power of the state on property to raise money for public purposes, and are not confined exclusively to support of the government. The term 'tax' includes money raised for public purposes in general, whether government or not."—*Davidson v. Ramsey Co.*, 18 Minn., 482.

"The distinction which has sometimes been attempted to be made between assessments for local improvements of this character [street improvements] and taxes does not rest upon any sound foundation, and seems to have led to much confusion. An assessment for the paving of an avenue constitutes a tax."—*Lefevre v. City of Detroit*, 2 Mich., 586.

"The word 'taxes' as used in an offer to sell property at a certain sum, net, free of all commissions, taxes, etc., includes special assessments."—*Gibbs v. People's Natl. Bank*, 198 Ill., 307, 64 N. E., 1060; *Hagertown v. Starzman*, 93 Md., 606, 49 Atl., 838; *Cassidy v. Hammer*, 62 Ia., 359, 17 N. W., 588.

Finally, the language of section 5703, which we are asked to construe, uses the word "taxes" without any limitation thereon. If it had been the intention of the legislature, as counsel for plaintiff in error insist it was, to limit the application of that section to the character of taxes provided for in the General Revenue Act, of which section 5703 is a part, it is reasonable to believe that the legislature would have so indicated by apt language. Not having so limited its application, we do not

feel warranted in reading into the statute, by judicial construction, a limitation not therein appearing, either in express terms, or, as we think, by reasonable implication.

Judgment Affirmed.

[No. 3899.]

JONES V. EMPIRE RANCH & CATTLE COMPANY.

1. TAX TITLES—*Void Deed*. A treasurer's deed executed upon a sale to the county, which fails to show the day upon which the lands were sold, is void, *e. g.*, a deed deciding only that the treasurer, at a tax sale "begun and held on the first day of October, etc., did expose to sale," etc.
2. TRIALS—*Pleading and Evidence*. A deed offered only as color of title does not support an allegation of title in fee.
3. PLEADING—*General Denial*. Under a general denial of the title asserted by plaintiff, in an action to quiet title, accompanied by an allegation of title in fee, the defendant may assail the validity of a tax deed offered by plaintiff.
4. LIMITATIONS—*The Five Years' Statute*, is not set in course by a void deed, and is not available to defendant in an action to quiet title. (Rev. Stat., sec. 5733.)
5. APPEALS—*Judgment*. Action to quiet title to lands. Judgment below for plaintiff was reversed, and the cause remanded with directions to enter judgment for defendant, on condition that he pay to plaintiff all taxes, interest and penalties found to be due.

Error to Denver District Court. HON. HUBERT L. SHATTUCK, Judge.

Messrs. ALLEN & WEBSTER, for plaintiff in error.

Mr. R. H. GILMORE, for defendant in error.

HURLBUT, J., rendered the opinion of the court.

June 8, 1908, appellee (plaintiff below) filed its complaint against many defendants, to quiet title to lands in

Yuma County. Appellant Jones succeeded to the title of defendant Susan Turpin, and by permission of court filed his answer therein denying all the allegations of the complaint, and alleging fee simple title in himself to a portion of the lands described in the complaint. The answer further alleged, by way of affirmative defense, that plaintiff's title to the premises was founded upon two tax deeds issued by the county treasurer and duly recorded; the first being dated October 21, 1903 (date of record not stated), but alleged to be void on its face; the second dated March 25 (24), 1908, (date of record not stated), and alleged to be void on its face, or, if fair on its face, void in fact, for reasons therein stated; the prayer being for specific as well as for general equitable relief. This last tax deed is alleged to be a correction deed of the one first mentioned. Plaintiff, by replication, puts in issue the affirmative allegations of the answer, pleads the five years statute of limitations (Mills' Annotated Statutes, sec. 3904), and admits that its title is founded upon the two tax deeds mentioned. The case was tried to the court without a jury. Judgment was rendered in favor of plaintiff, to which a writ of error was sued out in the supreme court, the cause being properly here under the legislative act of 1911 (Session Laws 1911, page 266 *et seq.*).

While a number of assigned errors are urged by appellant, the second assignment of error only need be seriously considered, as it is decisive of this case. Other assignments will be briefly noticed in this opinion. This second assignment pertains to the ruling of the trial court in admitting in evidence, over defendant's objection, the tax deed of March 25. When this deed was offered in evidence defendant objected to its introduction because, as stated, it was void on its face, and was wholly void and insufficient in this, to-wit: That it is not therein stated any time when the property was ex-

posed for sale; that it is not in conformity to the form of a tax deed prescribed by the statute; and that it omits a recital of the date of the exposure of the premises for sale. That part of the deed necessary to notice reads as follows:

“Know all men by these presents, that whereas the following described property, to-wit: (describing property) situated in the county of Yuma and state of Colorado, was subject to taxation for the year A. D. 1899; and, whereas, the taxes assessed upon said real property for the year aforesaid, remained due and unpaid at the date of the sale hereinafter named; and, whereas, the treasurer of said county did, in pursuance of a notice of sale of the said real property duly published and posted according to law, by virtue of the authority vested in him by law, at tax sale the sale begun and publicly held on the 1st day of October, A. D. 1900, expose to public sale at the office of the county treasurer in the county aforesaid, in substantial conformity with the requirements of the statute in such case made and provided, the real property above described,” etc.

It will be observed that the recital quoted does not pretend to state the date upon which the treasurer exposed and offered the property for sale. The only date mentioned in that behalf was that of October 1, 1900, that date being given as the time when the sale began. The county became the purchaser of the premises at the sale.

It has been repeatedly held by our supreme court that a tax deed which shows the property to have been bid in by the county must specifically recite the day on which the county purchased the same, and in addition, a prior date upon which it was exposed and offered for sale, and, if wanting in these respects, the deed is void on its face.—*Bryant v. Miller*, 48 Colo., 192, 109 Pac., 959. Testing this deed by the case just cited, it will at once be seen that it is void on its face, for the reason

that it does not appear from the recital that the premises were exposed and offered for sale on two separate and distinct days, which is the only condition upon which can be predicated a valid purchase of the premises by the county. The recital clearly shows that the premises were purchased by the county in violation of the provisions of the statute. Hence, the court erred in not sustaining defendant's objection, and excluding the deed from evidence. As this deed was erroneously admitted in evidence, and as the tax deed of October 21st was not offered in evidence by appellee as a muniment of title in support of his claim of ownership, but only as color of title, he wholly failed in proof of the title which he had pleaded in his complaint. Defendant, having denied plaintiff's title in his answer, and having proven his fee simple title as pleaded, was entitled to judgment and the relief prayed for in his answer.

Appellee urges in its brief that defendant could not challenge the validity of plaintiff's tax deed of March 25th because he had not in his answer denied plaintiff's title, but claimed that in his effort to do so he had only pleaded conclusions of law and facts. This contention is not tenable. Defendant's answer, by general denial, put in issue all the allegations of the complaint and then alleged fee simple title in himself to the disputed premises by virtue of a patent from the government to his grantor Susan Turpin, followed by a deed from her to himself. This is all that is necessary, in this kind of an action, for defendant to plead, in order to introduce documents in support of his title so pleaded.—*Millage v. Richards*, 52 Colo., 512, 122 Pac., 788.

It was clearly error for the trial court to rule that the said five years statute of limitations was available to plaintiff as a defense against defendant's pleaded title. In *Gomer v. Chaffee*, 6 Colo., 314, and *Page v. Gillett*, 47 Colo., 289, 107 Pac., 290, it was held that a tax deed void

on its face does not set in motion the said statute; and it is further held by the supreme court that such statute is not available as a defense in this kind of an action.—*Munson v. Marks*, 52 Colo., 553, 124 Pac., 187; *Carnahan v. Hughes*, 53 Colo., 318, 125 Pac., 116; *Empire R. & C. Co. v. Mason*, 22 Colo. App., 612, 126 Pac., 1129.

There are some other points relied on by defendant in error to sustain the judgment before us, which we deem unnecessary to consider. The judgment will be reversed and the cause remanded to the district court, with instructions to enter a decree in favor of plaintiff in error, conditioned upon payment by him to defendant in error of all taxes, interest and penalties, that may be found upon proof to be due.

Reversed and Remanded with Instructions.

[No. 3917.]

WELLMUTH V. ROGERS ET AL.

1. **APPEALS—County to District Court—Time of Filing Bond.** Under Rev. Stat., sec. 1537, the party defeated in the county court is entitled, without any order of the court, to ten days in which to file an appeal bond. The county court at the time of entering judgment may, on cause shown, allow for this purpose any reasonable time, beyond ten days; and, in the absence of any objection made at the time, it will be assumed in the court of review that the order was made on proper showing.

An order extending the time for filing the bond, made without notice to the successful party, is void.

So of an order made after the lapse of the time originally prescribed.

2. **PRACTICE—Motions—Notice.** Under secs. 405, 406 of the code, the county court has no authority to extend the time for filing an appeal bond, without notice of the application first given to the adversary party.

Error to Denver District Court. HON. HARRY C. RIDDLE,
Judge.

MR. HARRY E. KELLY and MR. CHARLES H. HAIMES,
for plaintiff in error.

MR. WILLIAM T. ROGERS, for defendant in error.

CUNNINGHAM, Presiding Judge.

Emma C. Chain died, leaving an estate of several thousand dollars. She left a will, naming Charles A. Erickson, a personal friend and legatee, as executor. The plaintiff in error, a brother, to whom the testatrix bequeathed but \$5.00, instituted a contest, alleging unsound mind and undue influence. After some delay, and one or more continuances, the contest was finally brought on for hearing before the county court. The contestant appeared in person, his attorneys, who had represented him in preparing and filing the *caveat*, having withdrawn their appearance, for some reason not explained, and not important. Evidence was offered by contestees to support the validity of the will. The contestant offered no evidence whatever. Thereupon the county court made an order admitting the will to probate, and noted contestant's exceptions, and his prayer for an appeal to the district court. The order admitting the will to probate was entered July 19, 1910, at which time contestant was given fifteen days to file his appeal bond. On August 1, 1910, before the expiration of the fifteen days, the judge of the county court, *without notice*, extended the time for filing the appeal bond until August 8, 1910. Thereupon contestant filed his appeal bond on August 8, 1910. On August 23rd, the appeal was dismissed in the district court, for the reason, apparently, that the same had not been perfected within ten days—the time fixed by section 1537, Revised Statutes.

This statement of the facts, though by no means complete, is sufficient to enable a proper disposition of

the question presented on this appeal, *i. e.*, whether or not the action of the trial court in dismissing the case was proper.

Section 1537, R. S. (1898), prescribes conditions upon which appeals are allowed from the county to the district court, and reads, in part, as follows:

“No appeal shall be allowed in any case unless the following requisites be complied with: First, the appeal must be made within ten days after the judgment is rendered, * * * *PROVIDED, HOWEVER*, That the county court may, at any time within the period above limited, upon good cause shown, extend the time for an appeal.”

As we understand the contention of counsel for defendants in error, the trial judge had no authority, under this statute, in the first instance, to give the contestant fifteen days, rather than ten days, in which to perfect his appeal by filing an appeal bond, or, if such time, *i. e.*, fifteen days, was given, still, if the contestant desires an extension he must apply for the same within the ten days fixed by the statute. This contention, we think, is not sound. The contestant, under the statute, had ten days in which to make his appeal, without any order of the court whatever; that is to say, the statute gave him that time. The county court immediately, at the time of the entering of its judgment, is authorized by statute to give the contestant fifteen days, or any other reasonable length of time, beyond the ten days, providing, of course, the same was upon good cause shown, and it goes without saying if, at the time the judgment was entered, the court did extend the time beyond the statutory period of ten days, its action was taken within the time fixed by the statute, *viz.*, ten days. In the absence of timely and proper objection made to the order of the court in giving the contestant fifteen days in which to file his bond, the same having been made within the proper time,

we must assume that it was made upon proper showing, hence the action of the county court in that behalf must be approved.

Moreover, the court had a right, *upon proper notice*, to further extend the time given the contestant in which to perfect his appeal, providing he, the contestant, applied for such further extension within, not the ten days fixed by the statute, but the fifteen days fixed by the court in its original order. But the action of the county court in granting a second extension of time, *i. e.*, extending the time to August 8th, appears to have been made without notice to the defendants in error, and for that reason said order was void, and the district court's action in dismissing the appeal was proper, even though it was not based upon that ground.

Section 405 of our Civil Code reads as follows:

“Every direction of a court or judge, made or entered in writing, and not included in the judgment, is denominated an order. An application for an order is a motion.”

Section 406, in part, reads as follows:

“* * * Written notice of motion shall be required in all cases except those made during the progress of a trial.”

It was expressly ruled in *Reeves v. Best*, 13 Colo. App., 225, 56 Pac., 985, that:

“The county court has no authority to extend the time for filing an appeal bond on appeal to the district court, unless the opposite party has notice of the application for such extension, and where the time for filing such bond was extended without notice to the opposite party, and the bond was filed after the expiration of the statutory time, but within the time as extended, the appeal was properly dismissed by the district court upon motion.”

The Reeves case was followed in *Van Duzer v. Caskie*, 13 Colo. App., 229, 56 Pac., 986. So far as we know, the ruling in these two cases has never been disturbed by either of our appellate courts.

After the district court had once dismissed the appeal, the county court, on August 27th, 1910, on application duly made, attempted to amend or alter its order of July 19th, by directing its clerk to amend the record of the original order, "so that said order shall show sixty days from said 19th day of July, 1910, to be allowed contestant for filing his appeal bond to perfect his appeal from the order of court entered on the 19th day of July, 1910," etc. This attempted amendment of the order, not having been applied for within the original fifteen days, was void. It may be, as the county court found, that this last application was made within term time, *i. e.*, within the term at which the original order was entered, but it was not made for the purpose of correcting any inadvertence, nor is there anything in the record to indicate that the court did not intend to make its order of July 19th precisely as it was at that time made. The last order, we think, was made for the purpose of attempting to avoid the fatal blunder which contestant had committed by having his time extended to August 8th, without notice. However commendable the action of the county judge may have been, from the standpoint of generosity, in his last order to relieve the contestant from his own failure to give notice of his application for the second extension, still, it may not be upheld by us without violating well recognized rules of practice.

The judgment of the district court is affirmed.

Judgment Affirmed.

[No. 3580.]

MERCURE ET AL. V. GIBSON.

1. **TAX TITLES—*Void Deed.*** A treasurer's deed appearing to have issued on a sale to the county, and an assignment of the tax certificate made by the county clerk more than three years after its execution and delivery to the county, is void upon its face.
2. **QUIETING TITLE—*Limitation.*** The five years' limitation (Rev. Stat., sec. 5733) has no application to an action to quiet title.
3. — ***Payment of Taxes.*** Taxes due prior to the recording of a treasurer's deed are not to be counted to support a plea of the seven years' statute (Rev. Stat., sec. 4087).
4. **SUMMONS—*Publication—Affidavit.*** Publication of the summons made upon affidavit of the attorney, not showing why it is not made by the plaintiff, or in which material averments are made upon information, or which fails to show that plaintiff is not informed of the residence of the defendant, is not a compliance with the statute. Judgment by default thereon is void.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellants.

Mr. ISAAC PELTON, for appellee.

BELL, J.

Appellee brought action March 10th, 1908, against appellants, under section 255, Mills' Annotated Code, to quiet the title to the N. W. $\frac{1}{4}$ Sec. 1, Twp. 2, N. R. 50 W., in Washington County, Colorado. Appellants, after denying the allegations in the complaint, set up a tax deed, issued to their grantor, Margaret D. Dickson, dated January 19th and recorded January 21st, 1901. For a third defense, they set up the five years statute of limitation; for a fourth defense a judgment of the county court of Washington County purporting to quiet the title to the premises in Stone, Stillman, Toms, trustee, and the Municipal Debenture Company; for a fifth defense, the seven

years statute of limitation, and payment of taxes thereunder for seven consecutive years, under claim and color of title made in good faith. The parties, respectively, introduced their evidence, then appellants moved for judgment on each of said defenses. Their motion was denied by the court, and a decree entered for the appellee quieting the title to the premises in him, and ordering appellee to pay to appellant Nelson \$133.50, taxes, interest and penalties which he and his predecessors in interest had paid on the property. The appellee established a fee simple title in himself to the premises through a chain of title from the government of the United States. The tax deed introduced by appellants was void upon its face because, among other reasons, the assignment of the tax sale certificate by the county clerk was made more than three years after its execution and delivery to the county of Washington.—*Empire Co. v. Irwin*, 23 Colo. App., 206, 128 Pac., 867; *Munson v. Marks*, 52 Colo., 553, 124 Pac., 187. The proof of the statute of limitation was insufficient: The five years statute because it does not apply to this form of action to quiet title; and the seven years statute, because appellants relied upon the payment of taxes on said premises from 1900 to 1906, both inclusive, and it required the payment of taxes for all of said years to cover seven consecutive years from the date of the recording of the deed to the time of the commencement of the suit. The taxes for 1900 were due for some time prior to the issuance of or recording of the tax deed, and the payment thereof cannot, under any condition, be considered as one of the requisite yearly payments.—*Cristler v. Beardsley*, ante, 369, 129 Pac., 867 (No. 3795), decided January 12th, 1914; *Empire Co. v. Howell*, 22 Colo. App., 584-599, 126 Pac., 1096; *DeFord v. Smith*, 23 Colo. App., 78-80, 127 Pac., 453; *Marks v. Morris*, 54 Colo., 186, 129 Pac., 828.

The judgment of the county court purporting to quiet

the title to the premises in *Stone et al.* was void, because, among other reasons, the affidavit as a basis for the publication of the summons was made by an attorney for the plaintiffs in the action, and on information and belief on important matters, and does not show that plaintiffs in the action did not know the residence of the defendant, nor why plaintiffs did not make the affidavit.—*Sylph M. & M. Co. v. Williams*, 4 Colo. App., 345-346, 36 Pac., 80; *Everett v. Ins. Co.*, 4 Colo. App., 509-512, 36 Pac., 616; *Davis v. J. L. M. Co.*, 2 Colo. App., 381-388, 31 Pac., 187.

Appellants showed no title to the premises, and raised many questions which did not tend to prove their title, many of which have been decided adversely to their contentions by this or the supreme court, and it would serve no good purpose if we should reconsider them.

We find no reversible error in the record, hence the judgment is affirmed, to take effect, however, upon the payment to appellant Nelson, or his legal representatives, the amount of taxes and interest found due him by the trial court, and appellee to recover his costs expended herein.

Affirmed.

[No. 3771.]

ROSS v. NEWSOM.

JUDGMENT—Record as Evidence. The record of the decree offered as evidence of title is not admissible unless accompanied by the judgment roll.

But it is not to be declared void upon collateral attack unless it shows affirmatively an absence of jurisdiction.

Appeal from Washington District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Mr. JOHN F. MAIL, for appellee.

HURLBUT, J., rendered the opinion of the court.

This is an action to quiet title, instituted June 8, 1909, in which plaintiff (appellee) recovered judgment.

Complaint is in usual form, to which defendant filed an answer, setting up seven defenses. The answer was met by general replication. The first defense pleads a general denial; the second, title by virtue of a tax deed recorded February 21, 1901; the third, a decree of the county court of Washington County, rendered July 2, 1902; the fourth, the five years equity statute of limitations; the fifth, the short statute of limitations, sec. 3904, Mills' Annotated Statutes; the sixth, the seven years statute of limitations based upon color of title taken in good faith and payment for seven successive years of all taxes legally assessed; the seventh, laches of plaintiff in bringing the action.

Our supreme court as well as this court have repeatedly considered and determined questions of law like those here presented, and in each instance have decided the same against the contentions here urged by appellant. No good purpose can be accomplished by reviewing those decisions.

Appellant complains that the decree in this case declared void the county court decree which was offered in evidence as an adjudication of the subject matter in issue and as an estoppel, but which was ruled out for the reason that it was not accompanied by the judgment roll. The district court was right in excluding the decree, but erred in declaring it to be void. Judge King, in *Empire R. & C. Co. v. Coleman*, 23 Colo. App., 351, 129 Pac., 522, has clearly reasoned and determined the proper action of the district court under circumstances similar to those existing here, and holds that it should not declare a county court decree void on collateral attack when the same does not affirmatively show on its face want of jurisdiction in the court; it being also held that the district court may

reject it as evidence (if not supplemented by the judgment roll) as being inadmissible to establish title in the party relying thereon.

The judgment should be modified respecting the county court decree, in harmony with the views above expressed, and as modified the judgment will be affirmed.

Judgment Affirmed.

[No. 3774.]

STRATTON V. MURRAY.

1. **EJECTMENT—Answer—General Denial**, admits defendant's possession.
2. — *What Must Be Specially Pleaded*. Plaintiff deraigns title through a trustee's deed. Under the general denial, defendant may show that the sale therein recited was never held (Rev. Code, secs. 62, 287).
3. **TRUST DEED—Trustee's Deed**, executed without any public sale, as required by the power contained in the deed of trust, is void.
4. — *Purchaser's Duty—Caveat Emptor*, applies strictly to a purchase at a trustee's sale. The purchaser must, at his peril, see that the trustee follows the requirements of the power of sale.
5. **TRIAL—Opening Case—Discretion**. Plaintiff in ejectment was informed, long before the trial, by a witness assuming cognizance of the fact, that a trustee's deed under which he deraigned title was executed without any sale made by the trustee. Held that it was his duty to anticipate this defense, and prepare to meet it upon the trial, and that it was not an abuse of discretion to refuse an application made after the submission of the cause, and before judgment, for leave to put in testimony in contradiction of that given upon the trial, to establish this defense.

Appeal from Logan District Court. HON. H. P. BURKE,
Judge.

MR. JOHN F. MAIL, for appellant.

MR. W. L. HAYS, for appellee.

HUBLBUT, J., rendered the opinion of the court.

This is a possessory action, instituted July 31, 1908, under sec. 265, Mills' Annotated Code, by appellant (plaintiff below) against appellee. Defendant filed his answer consisting of a general denial only.

At the trial plaintiff introduced in evidence the deeds and documents upon which he relied to establish his title, one of which (a trustee's deed) purported to convey the land in controversy to plaintiff. Plaintiff then rested; whereupon defendant produced two witnesses whose testimony tended to prove that the public sale mentioned in the trustee's deed had never taken place. Their evidence was to the effect that they appeared at the front door of the court house on the day of sale at nine o'clock in the morning and remained continuously there and thereabout until twelve o'clock; and that the trustee did not appear at that time at the court house, at its front door or other place near or about the same, and submit at public vendue the property in controversy. The court took the case under advisement, and fourteen days thereafter, and before judgment was announced, plaintiff filed a motion asking the court to reopen the case and permit him to introduce evidence in rebuttal to disprove the statements of the two witnesses mentioned, supporting the same with four affidavits. The court overruled said motion and rendered judgment in favor of defendant.

There are but two specific assignments of error, the first of which challenges the ruling of the court in permitting, against plaintiff's objection, the two witnesses to testify as to the absence of public sale of the premises in accordance with the advertisement.

Appellant urgently insists that the trustee's deed, being good on its face, fixed, *prima facie*, the legal title to the premises in plaintiff, and that, under the code, defendant having only pleaded a general denial, could not attack such deed by showing a want of capacity in

the trustee to execute the same through his failure to cry and sell the property at public auction at the time and place designated in the advertisement of sale; in other words that, by failing to specially plead in his answer the want of such sale, defendant was estopped from proving the absence thereof; citing in support of his contention *Wells v. Caywood*, 3 Colo., 487, and *Davis v. Holbrook*, 25 Colo., 493, 55 Pac., 730. Neither of these cases throws any light on the question. Our attention has not been called to any case in the appellate courts of this state, since the adoption of the code, involving the identical question before us. It may be conceded that the trustee's deed was good on its face, and fixed, *prima facie*, the legal title in plaintiff; and we are now to consider whether or not, under the general denial pleaded by defendant, he was entitled to establish, by proof, the absence of sale under the trust deed, and thus show fraud of the trustee in executing the trustee's deed without having first sold the land at public auction as required by the trust deed.

The controverted point is narrowed to the simple proposition whether, in a code action to recover possession of land, when the complaint simply avers the general title to be in plaintiff in fee, and the answer consists only of a general denial, the defendant may show by competent testimony the invalidity of a trustee's deed produced at the trial and relied upon by plaintiff, by disproving the recitals of such deed which allege that the property therein described has been sold at public sale in accordance with the terms of the trust deed, therein mentioned. Our supreme court has repeatedly decided that in the code possessory action the plaintiff must rely upon the strength of his own title and not upon the weakness of that of defendant, excepting only where the title to the land in controversy is in the government of the United States, and that the same principles

applicable to the action of ejectment existing prior to the adoption of the code govern in the code action, except where changed by statute. Under sec. 59, Mills' Code, the defendant may plead any defense he may have to a cause of action, whether it be denominated legal or equitable. Section 268 of the code, pertaining to possessory actions, reads in part as follows:

“The answer to a complaint filed under this chapter shall either specifically or generally deny the material allegations of the complaint; * * * The answer may also state generally as in the complaint the character of the estate in the premises, or any part thereof which the defendant claims, or any right of possession or occupancy he claims.”

It appears from this section that in such an action, if defendant chooses, he may rely solely upon a general denial to defeat plaintiff's claim. In this state, under the practice applicable to actions of ejectment prior to the adoption of the code, it was held by the supreme court in *Knox et al. v. McFarran*, 4 Colo., 586, that under the general issue in ejectment it was competent for defendant to show that a deed relied on by plaintiff was made with intent to defraud creditors, and the court, speaking through Judge Elbert, used this language:

“The superior facilities of a court of equity to investigate questions of fraud, its greater power to afford relief, the propriety of investigating questions touching the validity of conveyances of real estate in a direct rather than a collateral proceeding, would have made resort to its jurisdiction in this case advisable. Courts of law, however, have generally insisted upon a broad concurrent jurisdiction in matters of fraud, and we accept the decisions as we find them. In an action of ejectment it is competent to show that a conveyance relied upon by one of the parties to the action was made with the intent to defraud creditors. * * *

“That a like question of fraud might be investigated in an action of forcible detainer was held in the case of *Wilcoxon v. Morgan*, 2 Colo., 473. There is no reason for prescribing a different rule in ejectment.”

It will be noticed in the instant case that defendant neither pleads nor attempts to prove an equitable title to the property. He was in possession, and his general denial, as has been frequently held, admits his possession. Under the code he might have pleaded specifically an equitable or legal title, and introduced evidence in support thereof, but he chose to stand upon his possession and demand of plaintiff a full and clear proof of his pleaded title or right of entry. If the trustee executed the trustee's deed without having previously cried and sold the land at public auction, as required by the trust deed, he possessed no power or authority to execute the deed, and the same would convey no title to the grantee except the bare legal title; the equitable title still remained in the trustor. We think that in a code action of ejectment, under pleadings like these, defendant under his general denial could show the fraud of the trustee in executing the trustee's deed without having first sold the property at public vendue at the time and place fixed in the advertisement; and if his proof was sufficient in this behalf plaintiff's action would fail.

In *Harrison v. Hodges*, 49 Colo., 105, 111 Pac., 706, being an action under the code to quiet title to land, the plaintiff pleaded generally his ownership and possession of the land, and the defendant Hodges filed his answer denying the allegations of the complaint, and in addition pleaded generally his ownership in fee. Plaintiff's title was founded upon a tax deed which was offered in evidence by him but rejected by the court on the ground that it was void on its face. It was claimed by plaintiff (appellee) on appeal that defendant was not entitled to the relief given him by the court, because he had failed

to specially plead the defects in plaintiff's tax deed. The court ruled against his contention, and Justice Musser in rendering the opinion of the court used this language:

"It is impossible to conceive how the defendant in his answer could be expected to plead the defects in the tax sale or tax deed. The plaintiff in her complaint alleged that she was the owner of the land. The defendant in his answer was not bound to anticipate that the plaintiff would prove her title by tax deed. In fact, there was nothing in the complaint that called for more than a denial of plaintiff's title and the setting out of the right or interest claimed by the defendant."

In that case the defendant apparently put in evidence, over plaintiff's objection, testimony which tended to show that the tax deed was void because of failure of the revenue officers to comply with the law in prosecuting the proceedings which culminated in the tax deed. It was not indicated in that opinion what the rule would be in case the action were one for possession under the code. However, in *Empire R. & C. Co. v. Howell*, 24 Colo. App., 67, 131 Pac., 798, Judge Morgan, by way of *dictum*, held that in a possessory action under the code the rule should be the same in this respect as that announced by the supreme court in the Harrison case, using this language:

"Although not necessary to determine on this appeal, another assignment will be considered, whereby appellant contends that, under a general denial, in the replication, a plaintiff, in the code action for possession of land, cannot introduce evidence attacking a tax deed, introduced by defendant, for defects not appearing on the face thereof. This contention is not without merit, where the defendant pleads a tax deed, fair on its face, to establish title in himself.—*Anderson v. Bartels*, 7 Colo., 256 [3 Pac., 225]; *Schlegeter v. Gude*, 30 Colo., 310 [70 Pac., 428]; *Harrison v. Hodges*, 49 Colo., 105 [111 Pac.,

706]. In the last case cited, however, the supreme court held that in the code action to quiet title it is impossible to conceive how defendant can plead the infirmities in a tax deed that is not pleaded by the plaintiff; and it would seem that in the code action for possession of land it would be no less impossible to conceive how a plaintiff could be expected to plead in a replication the defects leading up to the execution of a tax deed relied upon by defendant, where the defendant has not pleaded it in the answer."

In *Watts v. Witt*, 39 S. C., 356, 17 S. E., 822, a possessory action, a question was presented somewhat similar to the one we have before us. The court held that defendant could defeat plaintiff's claim by showing that one of plaintiff's muniments of title was founded upon fraud in its execution, saying:

"She must, under the well settled rule, depend entirely upon the strength of her own title, and not upon the weakness of her adversary. A defendant in possession may either fold his arms and await the establishment of plaintiff's title, or he may show a superior title in some third person, and until the plaintiff shows a title superior to all the world, the defendant is entitled to retain possession. When, therefore, it appears that one of the links in plaintiff's title is defective or void, for fraud or other cause, the plaintiff fails to establish superior title, and the action fails on that account. Any other view would permit a party to take advantage of his own wrong."

In *Sparrow v. Rhoades*, 76 Cal., 208, 18 Pac., 245, 9 Am. St., 197, being an action in ejectment, in which defendant answered by a general denial, it was held the defendant could give evidence that the consideration for one of plaintiff's muniments of title was illegal, the court saying:

"Under a general denial in an action of ejectment

the defendant has a right to introduce in evidence any fact which might show or tend to show that the plaintiff had no right of entry when the suit was brought. * * * Under the general denial of the answer, evidence was admissible to show that the title, which on the face of the deed appeared to have passed to the plaintiff, could not have done so, and that the deed was worthless as a muniment of title, or, as that under which a right of entry accrued to the plaintiff, even although the fact that the deed was void by reason of an illegal consideration was not set up by special plea in confession and avoidance.

“The general denial of the defendant was in effect that he denied the plaintiff’s title and right of entry, the proof to sustain which was, that the deed under which the plaintiff claimed was in fact no deed at all—of no more value to convey title than a piece of blank paper, and utterly valueless as evidence of title.”—*Farley v. Parker*, 6 Or., 105, 25 Am. Rep., 504; *Gilman v. Gilman*, 111 N. Y., 265, 18 N. E., 849; *Kelso v. Norton*, 65 Kan., 778, 70 Pac., 896, 93 Am. St. Rep., 308; *Colorado Cent. Con. M. Co. v. Turck*, 50 Fed., 888, 2 C. C. A., 67; *Dobbs et al. v. Kellogg*, 53 Wis., 448, 10 N. W., 623; *Fitzgerald v. Shelton*, 95 N. C., 519; *Phillips v. Hagart*, 113 Cal., 552, 45 Pac., 843, 54 Am. St. Rep., 369. See also, *Lewis v. Hamilton*, 26 Colo., 263, 58 Pac., 196.

As to the remaining assignment of error, appellant insists that the court abused its discretion in overruling the motion to reopen the case and permit rebuttal testimony to be given. As above shown, both parties rested at the trial. The court took the case under advisement, and fourteen days thereafter, before judgment was announced, plaintiff filed the motion. It was within the discretion of the court to grant or deny the motion. We discover nothing in the record that suggests prejudice or feeling on the part of the court against plaintiff in its

rulings on the motion. Plaintiff had ample opportunity at the trial to ask for a continuance in order to produce, if he could, this rebuttal testimony. In the morning hour Murray and Morris had given their testimony. Plaintiff's attorney had not rested his case when a recess was taken at noon. He had two hours at that time to think the matter over, with full knowledge of the testimony attacking his trustee's deed. In his affidavit the attorney avers that during the recess he tried to find the substituted trustee, Arnold, but was unable to find him; still he went back to court at two o'clock and rested his case without making any motion or suggesting anything to the court in the way of a continuance, or that he desired further time to investigate the matters testified to by the two witnesses. After apparently being satisfied to submit the case to the court for determination as it stood, he waited two weeks thereafter before indicating to the court that he wanted an opportunity to introduce rebutting testimony. It is also stated in the attorney's affidavit that he had no knowledge whatever that defendant intended to question the sale upon which the trustee's deed was founded, and that he was surprised by the evidence of the two witnesses mentioned. The court could not have been much impressed with this statement, as the affidavit of the plaintiff himself stated that he talked with defendant's witness Morris on the day he recorded the trust deed, July 17, 1908, and that at that time Morris told him the land had not been sold, and affiant in reply asserted it had been sold and he had a trustee's deed which he had brought there for record. Morris also told plaintiff at that time that he was financially interested with Murray in the land and that if they could clear up the title they would own the land jointly; so that plaintiff's own affidavit shows he knew both Morris and Murray were contending that no sale had taken place, and he had every reason to believe that at the trial this would

be at least one defense he would have to meet. It should be presumed that plaintiff conveyed this information to his attorney, and he should not be heard at the trial to say he was surprised concerning the evidence of Morris and Murray. The statements contained in the affidavit of Arnold, trustee, are nothing more than an attempted effort to state the same facts concerning the sale which are already recited in the trustee's deed, which statements are much less clear and positive than those in the deed. No good purpose could be served by reopening the case in order to allow the trustee to recite the same facts already recited in the trustee's deed, and especially when of less force and clearness. As the case was tried to the court without a jury, it must be presumed that the trial judge carefully read and considered the four affidavits mentioned, and fairly measured the full force and effect of the statements therein contained, as against the sworn testimony given by Morris and Murray. It should also be presumed that if anything contained in the affidavits had created in the mind of the judge a serious doubt as to the sale or non-sale under the trust deed, he would have promptly granted the motion. The trial judge was warranted in considering every statement in the affidavits in connection with the sworn testimony given by the two witnesses, and if he were satisfied therefrom that the evidence as a whole preponderated in favor of the defendant he would be justified in overruling the motion, as he did. We cannot do otherwise than attribute to the able judge who tried the case perfect impartiality as between the contending parties, and we are not inclined to attribute to him an arbitrary and willful abuse of discretion as suggested by appellant.

This is not a case where a purchaser is striving to maintain his title to real property founded upon private purchase of premises where he is threatened with loss of his title by reason of some defect or omission in his title

deed which is discovered after the transfer; but is a case where he has loaned money or purchased a note or other indebtedness on the faith of a trust deed security upon real property. It is a universal rule in all jurisdictions that the doctrine of *caveat emptor* strictly applies in sales under a trust deed, and anyone standing in the position of a purchaser at a trustee's sale must at his peril see to it that the trustee who makes the sale has in every way fully and completely followed the directions prescribed for him in the trust deed.

In the light of this record we cannot say that the trial court abused its discretion in overruling plaintiff's motion.

Our conclusions as above expressed determine this appeal in favor of the appellee, and the judgment will be affirmed.

[No. 3812.]

HOUSE V. GRABLE.

1. **QUIETING TITLE—*Plaintiff's Title*.** If the defendant puts in a sufficient answer, the plaintiff must prove his title. Showing neither title nor possession, a judgment in his favor cannot be sustained.
2. — ***Defendant's Title*.** Where defendant, by cross-complaint, prays that title in him be quieted, he occupies the same position as plaintiff, and must prove his title before the relief demanded can be awarded to him.
3. **EVIDENCE—*Objections to Evidence*.** In an action involving title to lands, a deed not purporting to describe such lands is of no efficacy and will be disregarded upon appeal, even though the defect was not suggested below.

Appeal from Weld District Court. HON. NEIL F. GRAHAM, Judge.

Mr. THOMAS A. NIXON, Mr. JOHN C. NIXON, for appellant.

Mr. JAMES W. MCCREERY, Mr. DONALD C. MCCREERY,
for appellee.

KING, J., delivered the opinion of the court.

The Colorado Investment and Agency Company, a corporation, brought its action to quiet title to certain lands in Weld County, Colorado, making the usual allegations in actions of that kind under the code. After the institution of the suit, Jonathan S. Grable acquired, by deed from the plaintiff, any interest the plaintiff had in the lands, and continued the proceeding in the name of the original party plaintiff. For brevity, the appellant will be called the defendant, The Colorado Investment and Agency Company the plaintiff, and Jonathan S. Grable the appellee.

Defendant denied plaintiff's allegations of possession and ownership of the land; admitted defendant's claim to an adverse interest therein, and alleged that he was in possession of said premises, and the owner thereof by virtue of certain tax deeds, and asked that his title be quieted. Plaintiff, by replication, denied that defendant was the owner of said land, and alleged that the tax deeds relied upon were void on their face, and for reasons *aliunde*.

In an action to quiet title, when defendant has shown by his answer that he asserts such an interest, legal or equitable, adverse to the plaintiff, as, sustained by proof, will entitle him to relief in connection with the property, plaintiff must prove, by competent evidence, title in himself.—*Wall v. Magnes*, 17 Colo., 476, 30 Pac., 56; *Clark v. Huff*, 49 Colo., 197, 112 Pac., 542; *Empire R. & C. Co. v. Webster*, 52 Colo., 207, 121 Pac., 171. The authorities from other states cited by appellee, which hold that in a suit to quiet title, such as provided by our code, an answering defendant stands in the position of the plaintiff

in ejectment, are opposed to the views announced by our supreme court in the cases hereinbefore cited. That rule does not obtain in this state.

To sustain plaintiff's title, several deeds, exhibits "A" to "H," inclusive, were offered and received in evidence. To the admission of each of these deeds, defendant objected, on the ground that it was insufficient, and did not show or tend to show title or source of title in plaintiff. Exhibit "A" was a deed from plaintiff to appellee. Exhibit "B" was a deed from Francis C. Grable to plaintiff. Exhibit "F" was a deed from the sheriff of Weld County to James F. Johnson, and all were offered and received upon counsel's statement that they conveyed the lands mentioned in the complaint. Except for the defect in the sheriff's deed hereinafter mentioned, the title to the land in litigation appeared to be vested in Francis C. Grable by Exhibit "C," a deed from the Crow Creek Ranch and Reservoir Company to Francis C. Grable, conveying about 23,000 acres. The deed from Francis C. Grable to the plaintiff herein does not purport to convey the land described in the complaint, but instead conveys a parcel of land twenty-four miles north and twelve miles west of the tract in dispute, and, so far as the evidence discloses, the title to the land described in the complaint is still vested in Francis C. Grable. Appellee also wholly failed to show possession of the land in himself or his grantor. An abortive attempt to show possession was made by appellee's testimony that he had known the land for eighteen years, during all of which time it had been enclosed by fence, and pastured; but there is no evidence showing or tending to show that such possession inured to the benefit of plaintiff or of appellee. Neither the actual possession nor constructive possession was traced to them or either of them. As shown by the record here, the sheriff's deed which is the alleged source of title, and which conveyed about 26,000 acres of land,

makes no mention of the land described in the complaint; but as that defect is not mentioned by counsel for defendant or appellee, it may be inferred that the land was omitted from the transcript by clerical error.

Under the evidence, judgment for plaintiff cannot be sustained.

Under the cross-complaint and replication, defendant occupied the same position as the plaintiff with regard to the requirements of proof of title before he would be entitled to judgment. The tax deeds offered by him as evidence of his title were shown to be void, and were correctly so held by the court, and judgment cannot be entered in his favor.

Appellee contends that the objection made to his Exhibit "B" did not point out the defects in such deed, and therefore no advantage can be taken of such defect in this court. That rule is well established, but is not applicable. It applies to defects in such instruments, but not to such deeds as do not purport to convey title to the land the subject-matter of the suit. The deed might have been admitted without objection. That would not estop defendant from denying its efficiency. It has no bearing on the case. It is of no more force in this suit than a blank piece of paper. It is quite impossible to believe that counsel would have offered the deed mentioned as evidence of title, or that the court would have quieted the title thereupon, if its utter insufficiency and irrelevancy had been pointed out or discovered. It has not been shown that plaintiff has not title; but, inasmuch as there is a failure of proof to show that title, the judgment is reversed and the cause remanded for a new trial.

Reversed and Remanded.

[No. 3890.]

ROSS V. NICHOLS ET AL.

1. **PARTIES—Indispensable Not Joined—Waiver of Objection.** Defendants making no objection to the non-joinder of an indispensable party, the defect will be overlooked where it appears that no injustice will result.

2. **MORTGAGE—Foreclosure Sale—Effect.** On the expiration of the period of redemption allowed by the statute (Rev. Stat., sec. 3657) without redemption made, all right of the mortgagor in the premises is extinguished.

3. **MORTGAGOR AND MORTGAGEE—Contract Between Construed.** The holder of a certificate of purchase under a mortgage sale from which no redemption was made within the statutory period entered into an agreement with the mortgagor to convey the lands to him, upon certain conditions. The contract construed and held to be, as upon its face it imported, a contract of sale; and, not being in any part performed, it was held to confer no right.

Error to Arapahoe District Court. HON. CHARLES MCCALL, Judge.

Mr. JOHN R. SMITH, for plaintiff in error.

MESSRS. RITTER & MARSHALL, for defendants in error.

MORGAN, Judge.

Writ of error to the Arapahoe district court, to reverse a judgment in favor of the defendants in an action, commenced March 23, 1908, by the plaintiff in the nature of a creditors' bill, asking for determination and declaration as to the interest of defendant, Nichols, in and to the property involved; and asking that the plaintiff be allowed to pay off all claims of the other defendants upon the property, and thereafter to hold the same and subject it to the lien of his two judgments against the defendant, Nichols, the docket entry of which had been filed as required by law, on March 16, 1908.

The evidence discloses, chronologically, that:

Prior to any of the dates involved herein, Nichols owned the property subject to a mortgage to L. R. Bergeron for \$11,800.00.

On February 23, 1905, the property was sold to Bergeron for \$13,000.00 at sheriff's sale on the foreclosure of his mortgage and a certificate of purchase issued.

On April 14, 1905, Nichols gave a deed of trust to the defendant, Marshall, trustee, to secure \$3,500.00 due to the Central Savings Bank.

On May 25, 1905, Nichols gave a quit-claim deed to Marshall which it is admitted was to operate as a mortgage in connection with the deed of trust aforesaid, both subject to the Bergeron mortgage.

In February, 1908, about which date the bank had purchased and had assigned to it the Bergeron certificate, Nichols made a contract to sell the property to a man named Carper for \$80,000.00, which contract is referred to in the written contract involved in this case, which follows.

On February 28, 1908, a written contract was made between The Central Savings Bank and Trust Company, successor to The Central Savings Bank, and the owner of the certificate aforesaid, and Nichols, whereby the trust company agreed to sell and convey the property to him including some other property, Nichols agreeing to pay for the same \$18,792.79, but permitting the trust company to retain a one-fourth interest if he paid the entire amount on or before January 1, 1909, otherwise the trust company was to retain a one-third interest, thus contracting to purchase a three-quarter or two-third interest, as the case might be, Nichols to pay all taxes and assessments and insurance and forfeit all payments made if he failed to make any payment on or before the time it fell due, or within six months thereafter, and to hold possession of the property, during the life of the contract. Appellant contends this contract reveals and con-

fers upon Nichols an interest that can be reached and determined in this suit, and then subjected to the lien of his judgments.

On March 16, 1908, the plaintiff, Ross, having prior to that time recovered the two judgments against Nichols filed transcripts of the docket entry thereof with the recorder, both judgments amounting to about \$3,000.00.

On March 23, 1908, Ross brought this suit for the purpose of having Nichols' interest in the property determined, so that he might thereafter subject it to the effect of the judgment liens, on the theory that the entire indebtedness of Nichols to the trust company including the amount paid for the Bergeron certificate, were merged and the contract became and was a mortgage on Nichols' property in favor of the trust company.

On April 11, 1908, the trust company took a sheriff's deed upon its certificate of purchase and put it on record.

Willis M. Marshall was president of the bank, and afterwards, of its successor, the trust company, but was not sued as president of either, nor was the bank or the trust company made a party to this suit. The Carper contract was not introduced, and no further facts elicited concerning it.

The foregoing facts are all either admitted in the pleadings, or else appear in the written contract, or in the undisputed testimony of S. E. Marshall, as no other evidence was presented.

It plainly appears that the trust company would not be affected by any decree that might be entered in this suit; and it further appears from the written contract and Marshall's testimony that the trust company's interest is antagonistic to the interest of the plaintiff, and would have to be determined before the plaintiff could either pay the money he asks to be permitted to pay, or before he could subject the property to lien of his judg-

ments. The trust company was an indispensable party. However, as the defendants do not directly question plaintiff's right to have the matters determined without the appearance of the trust company, and as the facts would in all probability have been the same if it had been a party, no harm will be done by affirming the judgment on the following grounds.

All right and title of Nichols was lost on the expiration of his right to redeem from the Bergeron foreclosure, and all of the bank's, or Marshall's, or the trust company's rights under the deed of trust and the quit claim deed, were foreclosed and extinguished thereby; therefore, the trust company being entitled to a deed on the Bergeron certificate, Nichols had no interest when the judgment liens were filed, unless it arose by and through his contract with the trust company; and this was nothing more than an inchoate right depending upon his performance, or such partial performance, as would give him an indefeasible interest. It is not shown by the evidence that any part of this contract had been performed by him that might not be thereafter forfeited by his failure to perform the remainder under the terms of the contract.

It seems clear under the authorities that the trust company, as the holder of the certificate of purchase in this case, and being entitled to a sheriff's deed at the time this suit was commenced, had the right to sell the property to Nichols, or to anyone else, and that its contract with him amounted to nothing more than a contract of sale of the property to him, and that if this be true he would have no interest in the property that could be caught by the plaintiff's judgment liens.—*Roose v. Gove*, 32 Colo., 522, 77 Pac., 246. Marshall's testimony was very positive that the contract with Nichols was, as it shows on its face, a contract of sale, and not intended as a mortgage; and, as his testimony was not contradicted,

it seems impossible to hold that the contract was a mortgage, or intended as such.

And as to any interest Nichols might have had, as a purchaser of the property under the contract, assuming that his rights had not been forfeited by default in the payments, such right, if any, cannot be determined without the other party to that contract, the trust company, be made a party to the suit.

Judgment Affirmed.

[No. 3903.]

FRANKLIN ET AL. V. GENTER ET AL.

The judgment being supported by the evidence, affirmed.

Error to Arapahoe District Court. HON. CHARLES CAVENDER, Judge.

MESSRS. FRANKLIN & TEDROW, for plaintiffs in error.

MESSRS. THOMAS, BRYANT, NYE & MALBOURN, Mr. W. C. DANKS, for defendants in error.

CUNNINGHAM, Judge.

Plaintiffs in error brought their action in the district court, which was in the nature of a bill of discovery and for an accounting with reference to an alleged partnership between themselves and the individual defendants. The case was tried to the court without a jury, and after many days spent in taking testimony, and in oral arguments, the trial judge determined all of the issues of fact and of law in favor of the defendants in error, and entered judgment accordingly.

There are no disputed questions of law involved. A review of the facts and the 2,000 or more folios of evidence would be of no possible benefit to any of the parties

concerned. We think the evidence abundantly supports the findings of the trial court that there was no partnership, and that the original attempt on the part of all concerned to float a bond issue upon certain irrigation projects, and all agreements with reference thereto, had been entirely abandoned by Mr. Franklin and his associates, before Mr. Genter and his associates succeeded, upon an altogether different basis, in floating a bond issue and perfecting the titles contemplated by the original undertaking.

The whole basis for the bill rests upon the theory of bad faith on the part of the individual defendants in error, and especially Mr. Genter. The trial court completely exonerates Mr. Genter, and we think the evidence supports the action of the trial judge in this behalf.

The judgment of the trial court is affirmed.

[No. 3914.]

SUSSEX NATIONAL BANK OF NEWTON V. ADAMS.

Error being conclusively shown as to the amount awarded to plaintiff, the judgment was reversed, and the cause remanded with directions to the court below to enter judgment for the proper amount.

Error to Denver District Court. HON. GEORGE W. ALLEN,
Judge.

Mr. FRANK E. GREGG, for plaintiff in error.

Mr. A. M. STEVENSON, for defendant in error.

CUNNINGHAM, Presiding Judge.

Action on a promissory note; defendant, who was one of four endorsers, admitted his liability for one-fourth of the whole amount represented by the note, but insisted that, by reason of an understanding or agreement with the bank, this was the extent of his liability;

verdict and judgment went against defendant for that portion of the note, that is to say for one-fourth of the whole amount, and no more, and the bank brings the case here on error.

The evidence shows conclusively that defendant was liable for the full amount of the note, and interest, and the trial court should have so instructed the jury, and directed a verdict accordingly. This being the situation, the numerous errors committed by the trial judge in admitting improper evidence offered on behalf of the defendant, and in excluding proper evidence offered on behalf of the plaintiff, need not be considered.

The judgment is reversed, with directions to the trial court to enter judgment for the plaintiff for the full face of the note, with interest, as prayed for in the complaint, and for costs.

Reversed with Directions.

[No. 3801.]

WILSON V. CANADAY, ET AL.

Appellant having shown no right, the judgment affirmed.

Appeal from Phillips District Court. HON. H. P. BURKE,
Judge.

Mr. J. S. BENNETT, for appellant.

Messrs. MUNSON & MUNSON, for appellees.

Per Curiam.

After examining the entire record in this case we find there is no room whatever for questioning the justice of the judgment rendered by the trial court, and there was no error on the trial below, in the procedure, that can affect the substantial rights of the plaintiff. Indeed,

the record does not disclose that he had any substantial right, or even any shadow of right to the relief for which he prayed. In this court he attempts to stand upon a technicality that is wholly without substance or merit. He abandoned his complaint on the trial, and offered no proof upon the issues formed by the answer and the reply.

The judgment of the trial court is sustained.

Judgment Affirmed.

[No. 3913.]

MORRIS ET AL. V. BOARD OF COUNTY COMMISSIONERS OF
ADAMS COUNTY.

1. COUNTY COMMISSIONER'S BOND—*Liability—Statute Construed.* The statute (Rev. Stat., sec. 1251) providing that "any member of a board of commissioners who knowingly acquiesces in any misappropriation of the funds of a county, or in the allowance of bills which are not legally allowable," *held* that a mere mistake of judgment gives no action upon the bond, but that tortious or fraudulent conduct, with knowledge of the improper character of the charge allowed, must be shown.

Held, further, that the statute is not to be construed as a penal statute, and that, construing the statute as giving a penalty, the action being instituted more than one year after the offense was barred by Rev. Stat., sec. 4068.

2. COUNTY—*Liability for Attorney's Bill.* The bill of an attorney for services rendered in an election contest instituted to bring in question the election of a county commissioner is not a charge against the county.

In view of sec. 2099, Rev. Stat., an attorney should not be allowed for services rendered to county officials other than the board of county commissioners, unless such other officials are first authorized by the commissioners to employ or consult an attorney.

Under Rev. Stat., sec. 1241 and sec. 2096, the county commissioners are authorized to employ one or more attorneys on behalf of the county, and their action in the matter will not be reviewed by the courts unless it is made to appear that they acted unlawfully and corruptly.

3. — *Commissioners—Action Without Meeting.* The services of an

attorney for the county being necessary, his employment by a majority of the board, without meeting, may be afterwards ratified at a meeting duly held.

Error to Adams District Court. HON. CHARLES MCCALL, Judge.

Mr. N. WALTER DIXON, Mr. GEORGE ALLAN SMITH, for plaintiffs in error.

Mr. OMAR F. GARWOOD, Mr. GEORGE A. GARARD, Mr. ERNEST R. PROEMMEL, for defendant in error.

CUNNINGHAM, Presiding Judge.

The facts necessary to an understanding of this case are substantially as follows: Plaintiff in error, Mark M. Morris (hereinafter, for convenience, referred to as defendant), was elected county commissioner of Adams County in the fall of 1908. At the same time, Henry Nordloh was elected a county commissioner. Immediately following the election, a contest proceeding was instituted against Nordloh, which was not determined until about May 12, 1909, when the supreme court handed down an opinion holding Nordloh's election to be regular. See *Nordloh v. Packard*, 45 Colo., 515. The board of county commissioners of Adams county consisted of three members. The hold-over commissioner, Andrew M. Patten, during the contest proceedings, declined to recognize Nordloh as commissioner, and, probably for that reason, no meeting of the board was held until after the opinion of the supreme court was handed down in May. From January 12, when Nordloh and Morris assumed office, until May 12, when the regularity of Nordloh's election was confirmed by the supreme court, George Allan Smith, an attorney-at-law, at the instance and request of Morris and Nordloh, acted as the county attorney for Adams County, that is to say, he advised the board, represented the county in certain suits pending in court, in which the

rights or interests of the county were involved, and advised various other county officials. In other words, he appears to have performed all the duties that a regularly appointed county attorney is accustomed to perform. There appears to have been considerable political turmoil in Adams County immediately preceding January 12, which continued until the regularity of Nordloh's election was finally determined, and Smith testified that he devoted practically all of his time, during that period, to his duties as county attorney, and there is no evidence in the record tending to contradict his statement in this respect. As soon as the supreme court had determined the contest proceedings in favor of Nordloh, the board met and organized, whereupon Smith presented to the commissioners his bill for \$2,500 to cover services rendered by him during the period that he had been acting as county attorney, *i. e.*, from January 12 to May 12, 1909. The bill was taken up, considered and allowed, Nordloh and Morris voting in favor of its allowance, while Patten did not vote for or against it. A warrant was issued, and the money drawn thereon by Smith. On June 17, 1910, more than thirteen months after this bill had been allowed by the county commissioners, the board of county commissioners of Adams County, on the relation of Thomas A. Miles, brought suit against the defendant and his bondsman, The Fidelity and Deposit Company of Maryland, to recover the amount of money which, by reason of the vote of Morris and Nordloh, had been paid to Smith. It was alleged in the complaint that this money was paid to Smith on account of services rendered by him to Nordloh in the election contest case, and it is further alleged that Smith had not performed any services for Adams County, and that he was therefore, not entitled to receive the \$2,500, or any sum of money, from the county, "all of which was well known to the defendant, Mark M. Morris." The rights of the county to re-

cover were predicated upon sections 1248 to 1251, R. S., and especially upon section 1251, which reads as follows:

“In all suits upon official bonds of county commissioners, the recovery against one of the board shall not be limited to a proportionate amount of the damage proven, but the recovery on the bond of each shall be for the whole amount of damage proven; and any member of a board of commissioners who knowingly acquiesces in any misappropriation of the funds of a county, or in the allowance of bills which are not legally allowable, or in the payment thereof, and the sureties of such county commissioners shall be liable upon his bond for all damages, both proximate and remote, that such county shall sustain by reason thereof, to be recovered as above provided.”

1. The trial judge ruled that under section 1251 it was not necessary to show that a county commissioner who votes to allow a bill that is irregular or improper does so wilfully or corruptly, or that he has any actual knowledge as to the infirmities inherent in the bill, but that under such circumstances, the commissioner must be conclusively presumed to know the law. In other words, the trial court gave no force or meaning whatever to the word “knowingly.” On the contrary, by his interpretation of the aforesaid section, he read that word out of the section entirely. In this the trial court committed error prejudicial to the rights of the defendant. It will be observed that the word “knowingly” occurs in the same sentence with the word “legally.” It is plain that the legislative intent was that a commissioner should only be held liable where he knowingly allowed, or acquiesced in the allowance of, a bill not legally allowable. The word, “misappropriation,” as used in this act, we think, may fairly be said to contemplate something more than mere mistake of judgment in the allowance of a bill, or the paying out of money upon an honest mistake of judg-

ment. It implies tortious or fraudulent conduct on the part of the misappropriator. Our conclusion finds support in the following cases: *Price v. United States*, 165 U. S. 311, 41 L. Ed., 727, 17 Sup. Ct., 366; *Bryne v. State*, 12 Wis., 519; *Chicago R. Co. v. Kinnare*, 190 Ill., 9, 60 N. E., 57.

It is contended that our construction of the statute requiring the proof of actual knowledge makes it difficult for the county to recover. This may well be, but where the statute gives the county as many recoveries for a single loss or damage as it has commissioners, it can hardly complain that it takes this right along with the burden of strict proof. At any rate, we need not concern ourselves with the consequences of the statute, for it is not our duty to read out of it words of universal use and plain, every-day application. Moreover, if consequences are to be given consideration, the language of the supreme court of Mississippi is peculiarly pertinent to the subject now under consideration. In *Paxton v. Baum*, 59 Miss., 531, that court said:

“But we cannot ignore the fact that supervisors, in the discharge of many of their functions, are judicial officers, and especially so in adjudging upon the validity of claims against the county. A law which would make them personally liable for their erroneous judgment rendered, if constitutional, would certainly have the effect of preventing any solvent man from accepting office, or of becoming surety of those who did.”

If it had been the purpose of the legislature to make every commissioner liable who voted for a bill “not legally allowable,” without reference to his knowledge of the law or the facts, it would have omitted the word “knowingly.” If the statute be given the construction which the trial court placed upon it, then it becomes highly penal in its character, and the plea of the one-year statute of limitations, section 4068, interposed by the defendant on the trial, ought to have been allowed, and thus the case

would have been summarily disposed of. We do not believe that the statute is penal, when properly construed. A statute like this should not be held to be penal unless, by its clear terms, it must be so construed. It does not appear, from the language of section 1251, that the legislature intended to impose any pecuniary liability by way of punishment, for the amount is limited to compensation or damages, which negatives the idea of punishment, as such, and it may well be doubted whether this section of the statute adds anything to the remedy which the county has under the common law, or which is given it by the very terms of the commissioners' official bonds. A very able and elaborate discussion of the subject of penal statutes will be found in *Nebraska National Bank v. Walsh*, 68 Ark., 433, 82 Am. St. Rep., 301, 59 S. W. 952. We do not mean to be understood, in citing this case, that we agree with all the views therein expressed, since the Arkansas court reached the conclusion, and expressly ruled, that a section in all respects similar to our section 911, R. S., was not penal. This reasoning is contrary to the repeated ruling of our supreme court, and of this court. But the case is, nevertheless, ably argued, and contains liberal citations of authorities on this interesting question.

The errors into which the trial court fell are chargeable almost wholly to the view which it took of section 1251. This is made clear by the fact that in the announcement of its opinion to the jury, in connection with the instruction to the jury to return a verdict against the defendant, the trial court used the following language:

“It is not my intention to accuse Mr. Morris with wilful corruption, but I do mean to state, in a most positive manner, that in the allowance and payment of the bill in question, he exceeded the limits and bounds of his lawful authority as a county commissioner.”

And again, at the close of his remarks, which are preserved by bill of exceptions, the trial judge said:

“Every county official is presumed to know the law that is to govern his official conduct. He will not be heard to say that he does not know the law. Therefore, *by reason of the law*, Mr. Morris knew what he was doing. He knew the liability he was incurring in the allowance of the bill in question.” (Italics ours.)

Therefore, on this reasoning, the court reached the conclusion, and so announced, that:

“The claim allowed Mr. Smith was not a legal charge against the county, and I must find that the defendant knowingly misappropriated the funds of the county, to the extent of \$2,500, and the plaintiff is entitled to recover the same from the defendant and his bondsman, together with interest.”

It is plain, from this language, that the trial judge predicated his action in instructing a verdict in favor of the plaintiff and against the defendant wholly upon his interpretation of the statute, and not upon any finding of moral wrong or actual knowledge of wrong on the part of the commissioner in voting for the allowance of Smith's bill. In this connection it should be said that there is no evidence whatever that any part of Smith's bill was for services which he rendered in the election contest case of *Nordloh v. Packard*. Clearly that would not be a charge against the county. On the trial, Smith testified explicitly that he had been paid for that service by popular subscription, and that no part of his bill included services rendered in the contest case. For the error that the trial court committed in the interpretation of the statute, its judgment must be reversed, and the case remanded for further proceedings. But in view of another trial, it is proper that we should allude to other contentions raised in the brief, which we shall proceed to do.

2. It is urged on behalf of the county that because

Nordloh and Morris procured the services of Smith before there was any regular meeting of the board, the board of county commissioners, after the election contest had been determined and the board had met and regularly organized, had no authority to ratify what Morris and Nordloh had done in the matter of Smith's employment, and hence, no matter what services Smith had rendered the county, he had no remedy. With this view we cannot concur.—*Clark v. Lyon County*, 8 Nev., 182; *Mitchell v. Commissioners*, 18 Kan., 190; *True v. Commissioners*, 83 Minn., 293, 86 N. W., 102; *LaSalle v. Hathaway*, 78 Ill. App., 75.

To so hold, might necessarily lead to the gravest results. Nordloh and Morris were the duly elected commissioners of Adams County; it is apparent that the county was in need of legal advice; the evidence tends to disclose that Smith rendered valuable services to the county. If this were true, the board, very properly, we think, recognized his claims, and should be commended, rather than censured and penalized, for paying to Smith what his services were actually worth to the county. We do not mean to be understood as expressing any opinion whatever concerning the value of Smith's services, or the amount which the board ought to have allowed him. These are matters peculiarly for a jury, under proper instructions from the court.

3. It appears that Smith rendered services to the various county officials, such as the treasurer and assessor, and that his bill included charges for services of this sort. Ordinarily, county officials, like the treasurer and assessor, have no authority to bind the county for attorney's fees. Section 2099, R. S., makes it the duty of the district attorney to render opinions to county officials whenever he is called upon by them for advice. It is our conclusion that before a county attorney ought to be allowed to recover for services rendered to county

officials, other than the board of county commissioners, he should show that the board of county commissioners had given authority or direction to such other officials to employ or consult an attorney. However, it does not follow from this, by any means, that Morris, the county commissioner, in voting for the allowance of Smith's bill, would *ipsò facto*, become liable in damages to the county, for the county must go farther and show that the commissioner, in so voting to allow the bill, did so wrongfully and fraudulently, and with knowledge that the bill was unlawful.

4. It is vigorously contended on behalf of the relator, that because, under section 2096, R. S., the district attorney is obligated to represent the county in civil actions, and by section 2099, that official, upon the request of any county officer within his district, is required to give his opinion in writing upon all questions of law having reference to the duties of such official which may be submitted to him, the county was without authority to employ, or at least might not pay, a special attorney or a county attorney. This contention is without merit. By its terms, section 2096 authorizes the county commissioners of any county to employ one or more attorneys to appear and prosecute or defend in behalf of the people of the state of such county in any action or proceedings, and by section 1241, R. S., it is provided:

“The board of county commissioners of each county of the state may, when the interest of the county requires it, employ an attorney.”

The county commissioners are the judges of when the interests of the county require the employment of an attorney, and until it is made to appear that their judgment in this respect has been exercised unlawfully and corruptly, it will not be interfered with by the courts.—*Roberts v. People*, 9 Colo., 358, 13 Pac., 630; *Hurd et al. v. Hamill et al.*, 10 Colo., 174, 14 Pac., 126.

States having similar statutes to our own have taken the same view of the authority of the board of county commissioners to employ special counsel as have our own courts. See *Tatlock v. Louisa Co.*, 46 Ia., 138; *Jordon v. Osceola Co.*, 59 Ia., 388, 13 N. W., 344; *Clark v. Lyon Co.*, 8 Nev., 182.

The judgment of the trial court is reversed, and the case remanded for further proceedings in conformity with the views herein expressed.

Reversed and Remanded.

[No. 3923.]

WATKINS, RECEIVER, v. PERRY ET AL.

1. PARTIES—*Indispensable*. A decree foreclosing a mortgage is not rendered void by the failure to bring in a junior mortgagee.
2. CONSPIRACY—*Agreement to Do What Is Lawful*, though with a sinister purpose, is not unlawful, nor is what is done, pursuant to such agreement, void.
3. SUMMONS—*Publication*, upon an affidavit which fails to state either the defendant's postoffice address, or that it is unknown, is not a compliance with the statute, and a judgment by default thereon is void as to the defendant upon whom service is so attempted.
4. JUDGMENT—*Relief in Equity*. A decree of foreclosure rendered against the trustee in a deed of trust of lands, without service upon such trustee, may be vacated by an equitable action in the nature of a bill to remove a cloud upon title. *Semble*, a bill to redeem from a former mortgage foreclosed in such irregular proceeding would have been the better action, because affording full relief and a complete remedy.
5. PUBLIC TRUSTEE—*Nature of the Office*. The office of public trustee is distinct from that of county treasurer. A complaint against the county treasurer, by that title only, with the addition of "trustee," nowhere naming him as public trustee, does not make the public trustee party.
6. PARTIES—*Mortgage Foreclosure—Redemption*. A creditor, for whose security lands are conveyed to the public trustee, may defend a suit for

the foreclosure of the deed of trust, or may prosecute a suit to redeem from a prior encumbrance.

Error to Adams District Court. HON. CHARLES MCCALL, Judge.

Mr. R. A. CROSSMAN, for plaintiff in error.

Mr. JOHN H. DENISON, for defendant in error Perry.

Mr. B. C. HILLIARD, Mr. J. R. ALLPHIN, for defendant in error Strauss.

KING, J., delivered the opinion of the court.

February 21, 1907, the plaintiff, as receiver of the Home Co-operative Company and of W. B. Sullivan, filed his bill in equity, asking that a foreclosure decree entered by the district court of Adams county September 15, 1905, in a proceeding there pending, in which defendant Perry was plaintiff and defendant Strauss and her husband and W. B. Sullivan were defendants, be vacated and set aside, and that the sheriff's sale and sheriff's deed made pursuant to said decree be held for naught. W. B. Sullivan was the beneficiary named in a deed of trust which was junior to the mortgage foreclosed. The complaint alleged that the decree of foreclosure was rendered without first obtaining service of summons upon said Sullivan, and is therefore void, and that the decree was obtained by fraud practiced upon Sullivan by the plaintiff and defendant Strauss, in that proceeding, and for that reason is void. Defendants offered no evidence. On the conclusion of plaintiff's testimony, a motion for nonsuit was sustained.

The pleadings and evidence taken together show that about November 10, 1903, Mary M. Strauss, defendant in this suit, through some agreement made for her by the Home Co-operative Company with Mary A. Perry, also a defendant, became the purchaser of certain real estate in Aurora, Adams County, Colorado, of which Perry was

the record owner; that the purchase price to be paid to Perry was four thousand dollars, of which the first instalment of one hundred dollars was paid by the company at the time the contract was made; the land was conveyed to Strauss, who gave her promissory note for three thousand nine hundred dollars, payable to Perry in monthly installments of one hundred dollars each, with interest at six per cent per annum payable semi-annually, and, to secure the payment of the note, gave her mortgage on the real estate purchased; the note and mortgage were dated November 10, 1903; at the same date Strauss gave her promissory note, whereby she agreed to pay to the order of W. B. Sullivan twenty-one dollars and twenty cents per month on the tenth day of each month for thirty consecutive years, according to the terms of a contract theretofore made between Strauss and the Home Co-operative Company, and, to secure the payment of said note, gave her deed of trust, whereby she conveyed to the public trustee of Adams county the same real estate described in the mortgage aforesaid; this deed of trust was recorded November 14th, junior to the mortgage lien. For some reason not clearly disclosed by the evidence—but presumably under the contract between Strauss and the Home Co-operative Company—that company paid to Perry, as they fell due, the first seventeen monthly instalments of one hundred dollars each secured by the first mortgage, but the two payments which fell due, respectively, April 25th and May 25th, besides certain interest, were unpaid on June 5th when Perry, by the issuance of summons, began proceedings to foreclose her mortgage. She named as defendants Strauss, Sullivan and George M. Griffin, “County Treasurer of Adams County, Trustee.” On the day the writ issued, Strauss and her husband acknowledged service of the summons, and after ten days the sheriff returned the same as served upon “George M. Griffin,” and further certified that Sullivan

could not be found in said county. September 14th or 15th decree for foreclosure was rendered, in which it was recited that personal service had been made on "George M. Griffin, County Treasurer, as Trustee," and service made upon W. B. Sullivan by publication; that all defendants made default, and, among other things, provided that all the right, title and interest of the defendants or either of them in the said premises be forever barred and foreclosed, and that any excess of selling price at execution sale, over the amount of judgment, be paid to Strauss.

1. Plaintiff's contention that the foreclosure decree, as a whole, and as affecting Perry and Strauss, as well as Sullivan and the public trustee, is void, cannot be sustained. The decree as between Perry and Strauss is not rendered void by reason of the fact that the junior mortgagee or subsequent grantee was not made a party to the suit or served with summons therein.—27 Cyc., 1587, and cases cited. But plaintiff also claims that the decree was rendered void because a conspiracy was entered into between Perry and Strauss to defraud the said Sullivan, and to defeat his interest or equity of redemption in the premises. The evidence tends to show, if it does not conclusively show, that such conspiracy in fact existed, but that fact alone would not defeat the foreclosure proceedings as affecting Perry and Strauss only. There was default in payment of the debt secured by the mortgage, by reason of which Perry had a lawful right to foreclose, and that right would not be affected by proof of an agreement or conspiracy to foreclose. An act which one may lawfully do will not be rendered unlawful or void by an agreement to do the act, although for a sinister purpose.—8 Cyc., 645.

2. The pretended attempt to obtain service of summons upon Sullivan by publication failed. The affidavit upon which the order for publication of summons was

made failed to state the postoffice address of Sullivan, or that such postoffice address was unknown. Such failure rendered the order for publication and the attempted service by publication wholly void.—*Empire R. & C. Co. v. Coldren*, 51 Colo., 115, 117 Pac., 1005; *Empire R. & C. Co. v. Howell*, 22 Colo. App., 389, 125 Pac., 592. Inasmuch as summons was not served upon Sullivan, the beneficiary named in the deed of trust, the said decree, so far as it affected or purported to extinguish the interest or any right of said Sullivan in and to the said premises, was void, for want of jurisdiction. Sullivan was the owner of the equity of redemption. The first mortgage was a lien upon the real estate; but the public trustee of Adams County held the legal title of said premises as trustee for Sullivan. The decree, by its express terms, barred and foreclosed such equity of redemption, and purported to extinguish the legal title held by such public trustee, and while for want of jurisdiction the decree is void so far as it affects or purports to affect the interest of Sullivan, nevertheless, *prima facie* it extinguishes that right. The present suit is in the nature of an action to remove the cloud cast by the decree upon the title to the real estate, which is held as security for the beneficiary in said deed of trust, and upon his right of redemption, and as such may be maintained, although a suit to redeem from the first mortgage might also have been sustained, and perhaps would have been the better proceeding, as offering a complete and final remedy and settlement of the litigation.—*Munson v. Marks*, 52 Colo., 553, 124 Pac., 187; *Eagan v. Mahoney*, 24 Colo. App., 285, 134 Pac., 156. It is contended by defendant in error that, although service of summons was not made upon Sullivan, the public trustee was made a party to the suit and served with summons, and for that reason the court obtained jurisdiction to enter the decree as against both Sullivan and the trustee. We think that contention is

without merit. If it be conceded that the interests of the beneficiary can be concluded or affected by foreclosure proceedings to which he is not a party, by virtue of service upon the trustee in a deed of trust (which we do not decide), nevertheless we think that in this case the public trustee was not made a party to the suit, and there is no evidence that the public trustee was served with summons. In the caption of the summons and of the complaint, "George M. Griffin County Treasurer of Adams County Trustee" is named as a defendant; he is nowhere designated as public trustee. The office of public trustee is a distinct office from that of county treasurer. The fact that the county treasurer of Adams County may have been ex-officio public trustee does not make the office nor the officer the same. The sheriff's return upon the summons does not indicate that George M. Griffin, served as the defendant, was either county treasurer or public trustee. The words "County Treasurer of Adams County" annexed to the name "George M. Griffin" are mere *descriptio personae*, and wholly insufficient to make the public trustee a party to the suit. We hold that the public trustee named in the deed of trust as trustee was not a party to this suit, and not served with summons as such, and for that reason the decree, so far as it purports to extinguish the legal title held by the public trustee, or affect it, is void.

Defendant in error appears to take the position that neither Sullivan nor his assignee, the Home Co-operative Company, nor plaintiff as receiver of both Sullivan and said company, is owner of the equity of redemption. We do not agree with this contention. The public trustee, as trustee for Sullivan, held the legal title. Sullivan, as beneficiary in said deed of trust, was a subsequent encumbrancer, and by all the authorities, Sullivan and his assignees had the right to redeem from the first mortgage or to defend against the suit for foreclosure.—27 Cyc.,

1562, 1564, 1799, 1804, 1805; *Carpenter v. Brenham*, 40 Calif., 221.

The evidence upon the part of the plaintiff, unexplained by the defendants, raises a presumption that intentional fraud was practiced upon Sullivan by the plaintiff and defendant in the foreclosure proceedings, for the purpose of obtaining without his knowledge a decree which would extinguish his interest, and without a hearing or opportunity to protect himself, confiscate the amount which had been paid to Perry by the Home Co-operative Company of which Sullivan was the agent, and for that reason they cannot justly complain if the court leaves them in the position in which they placed themselves.

The judgment will be reversed and the cause remanded, with instructions to hold void and set aside the decree of foreclosure entered by said court, so far as it recites service of summons upon W. B. Sullivan and upon the public trustee of Adams County, trustee in the deed of trust herein mentioned; to set aside and vacate that portion of the decree purporting to bar and foreclose the right or interest of the said W. B. Sullivan or the public trustee in and to the premises described in the mortgage, and also that part which orders that any excess over Perry's claim be paid to Strauss; also to restore to plaintiff all rights held by Sullivan at the time suit was brought or by his assignee, and to grant a new trial to the plaintiff herein as to any other matters or things that may be properly made an issue, in conformity with the views herein expressed.

Reversed and Remanded.

[No. 3864.]

CORYELL V. LAWSON.

1. CONSTITUTIONAL LAW—*Imprisonment for Debt*. Sec. 12 of art. II of the constitution is not self-executory.

2. STATUTES—*Penal—Construction*. A statute authorizing imprisonment for a civil liability is strictly construed.

3. IMPRISONMENT FOR TORT—*Verdict*. Action for an assault and battery. The jury found defendant guilty, awarded exemplary damages, and declared the defendant "guilty of evil intent," not expressly declaring that such evil intent existed in the commission of the tort. *Held* that an order for the arrest and commitment of the defendant was unwarranted. The statute (Rev. Stat., sec. 3024, 3025) requires that the jury should state in their verdict that "in committing the tort" the defendant was "guilty of malice," etc.; and the court is not warranted in reading into the verdict a statement of fact which the statute requires from the jury itself.

Held further, that in view of Rev. Stat., sec. 2067, the award of exemplary damages was without effect to enlarge the finding of evil intent.

4. INSTRUCTIONS—*Construed*. Action for an assault and battery, the complaint alleging malice, and demanding execution against the body. The answer denied malice. The court directed the jury to state in their verdict whether defendant, in committing the tort, was "guilty of either malice or evil intent." *Held* that the phrase "evil intent" was not intended by the court, or accepted by the jury, as a synonym of malice; and, not being contained in the statute, it was error to direct a finding thereon.

5. DAMAGES—*Exemplary*. Under Rev. Stat., sec. 2067, an award of exemplary damages for a wrong to the person may be upheld if the defendant inflicted the injury in wanton and reckless disregard of plaintiff's rights, though malice was entirely wanting.

Error to Garfield District Court. HON. JOHN T. SHUMATE, Judge.

Mr. C. M. DARROW and Mr. J. M. CATES, for plaintiff in error.

Mr. WM. J. KERR and Mr. D. M. CAMPBELL, for defendant in error.

HURLBUT, J., rendered the opinion of the court.

Action begun December 10, 1904, by defendant in error as plaintiff, against plaintiff in error, to recover for injuries occasioned by gunshot wounds inflicted upon the former by the latter. Plaintiff recovered judgment, followed by an order of imprisonment, based upon secs. 3024-5, Revised Statutes. A writ of error was sued out to review these proceedings, and the supreme court granted a supersedeas. The case is here by virtue of an act of the legislature, Session Laws 1911, page 266 *et seq.* There is no bill of exceptions in the case, and we have for consideration only the record proper, as certified by the clerk of the court.

The complaint charges that on May 28, 1904, in Newcastle, county of Garfield, defendant committed an assault upon plaintiff, by firing upon him with a gun, thereby permanently injuring him, and that defendant made said assault under circumstances attended by malice and wanton and reckless disregard of plaintiff's rights. The prayer of the complaint asked for execution against the body of defendant. The answer formed issues upon all the allegations of the complaint. The jury returned the following verdict against defendant, *viz:*

"We, the jury, duly impaneled and sworn in the above entitled cause, do on our oaths, find the issues joined herein in favor of the plaintiff, and assess his damage as follows:

"Doctor bills, nurse bills and medicine.....	\$ 350
"For loss of time of plaintiff.....	400
"Exemplary damages.....	250
"General damages.....	1,000

"and therefore find \$2,000 as the sum total of the damages to which plaintiff is entitled herein; and we further find that said defendant was guilty of evil intent."

One question necessary to be considered is that

raised by the assignments of error, pertaining to the validity of the order of commitment and sufficiency of the verdict to warrant the same. The sections referred to read as follows:

“3024. In any civil action pending or hereafter begun in any court of record or before any justice of the peace, where it shall appear from the summons and other papers in the cause, that the action is founded upon tort. and upon trial of the said cause the finding shall be in favor of the plaintiff or plaintiffs, and the verdict of the jury or the finding of the court, if tried without a jury. shall state that in committing the tort complained of, the defendant or any one or more of the defendants if there be more than one, was or were guilty of either malice, fraud or wilful deceit, then, and in any such case, the plaintiff may have execution as hereinafter provided against the body of any defendant against whom such finding was had or any judgment rendered on any finding as aforesaid; Provided, That in no case shall an execution issue against the body of a person when the person shall have been convicted in a criminal prosecution for the same wrong.

“3025. If the finding of the court or jury, as the case may be, in any such action, shall contain a statement as is provided in section four of this act, it shall be the duty of the court or justice of the peace before which such case shall be tried, to enter upon its or his docket, in the discretion of the court, according to the aggravation of the circumstances as proved at the trial, the term for which a defendant or defendants may be committed to jail on a writ of execution against the body in such case. Such term not to exceed one year in any case, and the execution and mittimus shall state the time so fixed by the court; Provided, That no execution shall issue against the body if the amount of the judgment shall have been paid, and that any person committed to jail by such

process shall be released therefrom at once, upon the payment of such judgment."

In the original act of 1877 these two sections are designated as sections 4 and 5 respectively.

It will be noticed (sec. 3024) that in order to authorize an order for arrest and imprisonment it is necessary for the jury to *state* in their verdict "that in committing the tort complained of, the defendant * * * was * * * guilty of either malice, fraud or wilful deceit." It is strenuously urged by plaintiff in error that, because of the failure of the verdict to contain the words "that in committing the tort complained of," the order of commitment was void, unwarranted, and of no effect.

The statute is highly penal in its nature, as it contemplates imprisonment for debt. Such statutes are universally held to be penal, and require a strict construction in their interpretation. In *Hathaway v. Johnson*, 55 N. Y., 93, 14 Am. Rep., 186, an order for the arrest of defendant was granted. It appears that the order was founded upon fraudulent representations made by an agent of one who was charged as principal. The court of appeals set aside the order, saying:

"The act of April 26, 1831, 'to abolish imprisonment for debt, and to punish fraudulent debtors,' abrogated the system under which an innocent debtor, whose only fault might be his inability to pay his debts, could be deprived of his liberty and imprisonment at the instance of the creditor. It was a system of great severity, fruitful of oppression; and its abolition was demanded by public sentiment, influenced by the growth of more just and humane views of the respective rights of creditors and their debtors. * * *

"Statutes authorizing arrest and imprisonment for debt, although remedial in that they are designed to coerce, by means of the imprisonment, the payment of the creditor, are also regarded as penal, and ought not

to be extended by construction so as to embrace cases not clearly within them.”

Section 12 of article 2, of the Colorado Constitution, reads as follows:

“That no person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases of tort, or where there is a strong presumption of fraud.”

It will be seen from the language of this section that it is not self-executing, but that, in order to justify the arrest and imprisonment of one who has committed a tort, it requires a statute of the legislature or other law-making power.

The sections above quoted first appeared in the General Laws of 1877, pages 573-4, and have been retained in the statutes to the present time. Of the sections quoted, sec. 3024 provides that if the verdict *states* “that in committing the tort complained of” the defendant was guilty, etc., execution against the body may issue. In sec. 3025 it is provided that if the verdict contains *such* statement body execution may issue, etc. Upon this point the verdict merely recites that “defendant was guilty of evil intent,” entirely omitting to state that such evil intent was present while the tort was being committed. If this statute must be considered penal and strictly construed (of which we think there can be no question) then the order of arrest issued by the district court was void and did not warrant arrest and imprisonment thereunder. We think the legislature only intended to permit imprisonment for tort in a case where the verdict contained a recital of those facts which the act required to be stated therein. It is true that the verdict found \$250 exemplary damages, but this does not necessarily imply that the jury found defendant guilty of malice, fraud or wilful deceit, because in sec. 2067, Revised Stat-

utes, on which the action for exemplary damages is based, we read:

“That in all civil actions in which damages shall be assessed by a jury for a wrong done to the person, * * * and the injury complained of shall have been attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings, such jury may * * * award him reasonable exemplary damages.”

From this it will be seen that that part of the verdict assessing exemplary damages could be upheld if malice, fraud or insult, were entirely wanting. It would be sufficient if the jury believed that the injury inflicted on defendant was attended by circumstances showing a wanton and reckless disregard of his rights and feelings. Defendant himself, in his answer, denies that he ever committed any wrong toward plaintiff through malice or ill will, and avers that at no time had he ever harbored any ill will or malice toward him, and further, that he assaulted plaintiff because he believed he was in danger of bodily injury from him, and made the assault in self-defense, as he believed. The evidence is not before us, and while we must assume that it was sufficient to support the verdict returned, we are not warranted in assuming that the jury found therefrom that evil intent on the part of defendant was manifested *at the time of the assault*. If such were the fact, the legislature made it the imperative duty of the jury to so find, and to state the same in their verdict. This the jury did not do. In construing this penal statute the court is not warranted in reading into the verdict any statement of facts which the law required the jury itself to incorporate therein, at least not in a case where it is necessary to do so in order to justify imprisonment of a debtor.

While we have been unable to find any authority upon the exact point under consideration, there are in-

numerable cases in the reports founded upon analogous penal statutes, which authorize arrest and imprisonment for debt in cases where the debtor has been guilty of fraud in concealing property; in contracting the debt; in attempting to conceal or remove his property with the intent to defraud creditors, and the like. The general trend of the rulings in such cases is that such statutes are penal and must be strictly construed in the interest of the debtor sought to be imprisoned. In many of the states so holding, the warrant of arrest is founded solely upon statutory affidavits wherein certain matters are required to be specifically *stated* as a basis for arrest. In such cases the courts seem to invariably rule that a failure to state in the affidavit those matters specifically required by the statute renders the warrant of arrest and imprisonment based thereon absolutely void and affords no justification to the officer acting thereunder.

In *Spice & Son v. Steinruck*, 14 Ohio St., 213, defendant in error was arrested at the instance of plaintiff in error, and the proceedings were based upon a statutory affidavit. The law required that the affidavit should contain a "statement of the facts claimed to justify the belief in the existence of the particular fraudulent act set forth" as a condition precedent to the right to issue the order of arrest. The affidavit failed to state such matters. Counsel urged that such requirement was merely directory, but the court held such contention untenable. The arrest was held unlawful, the court saying:

"We can by no means assent to the position of counsel for plaintiff in error, that the last clause is *directory and not jurisdictional*, and that its entire omission would not render the arrest under it void, but merely voidable. The legislature has seen fit to declare that the affidavit to authorize the order, *shall* contain such statement. It is made a condition precedent to the right to

issue the order, and one with which the courts have no right to dispense. * * *

“These authorities very clearly indicate, that a total omission, as in the case at bar, to state the facts inducing the belief in the existence of the particular set forth in the affidavit, when such statement is required as a predicate of the order, renders the order itself illegal and void for want of jurisdiction in the justice to issue it, at least as between the parties to the proceedings. * * *

“The authorities cited, and a just and proper regard for personal liberty, constrain us to hold, that where a creditor seeks to arrest his debtor under section 20 of the Justice’s code, he must comply with all the conditions thereby prescribed, and must, therefore, state in his affidavit, among other things, ‘*the facts claimed to justify belief* in the existence’ of the fraudulent act and intention set forth as a ground for the order. That until this is done, the justice has no legal authority to issue such order, and that an arrest under an order unsupported by such an affidavit, will be held void in whatever form the question may arise.”

The case just cited is well considered and cites many authorities sustaining its ruling.

Thatcher v. Powell, 6 Wheaton, 30, 5 L. Ed., 221, was an action in ejectment, in which certain questions arose as to the validity of an order of the lower court based upon a statute concerning tax proceedings. The court held that the statute authorizing such an order must be strictly followed or the order would be void. The court, speaking through Chief Justice Marshall, said:

“In summary proceedings, where a court exercises an extraordinary power, under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction, ought to appear, in order to show that its proceedings are *coram judice*.”

We are of the opinion that the omission from the

verdict of the words "that in committing the tort," renders the order of arrest based thereon void, and that the trial court fatally erred in issuing the same.

The record presents another situation which tends to a fair presumption that the jury found the defendant was not guilty of malice, *viz.*: The following instruction was given by the court:

"The court instructs the jury that this is an action founded upon tort, and if you in your verdict find for the plaintiff you shall state in your verdict if in committing the tort complained of the defendant was guilty of either malice or evil intent."

This instruction was erroneous, as the words "or evil intent" are not in the statute, and the court should not have added them. The verdict of the jury closed with the words, "and we further find that said defendant was guilty of evil intent."

Considering the instruction and that portion of the verdict quoted, we reach the conclusion that the jury purposely found that the defendant was not guilty of malice, but was guilty of evil intent. The jury was enjoined by the instruction to find whether or not the defendant was guilty of either malice *or* evil intent. It is evident from the record that no question of fraud or wilful deceit was involved in the issues of the case, and the jury having found that defendant was not guilty of malice, it is apparent that neither the court, in giving the instruction, nor the jury, in returning the verdict, considered the phrase "evil intent" as a synonym of the word "malice," which left nothing in the verdict upon which could be predicated the order of arrest.

It will be unnecessary to notice other assignments of error discussed, as those already alluded to determine this case. The judgment will be reversed.

Judgment Reversed.

Decided January 12, A. D. 1914. Rehearing denied, March 9, A. D. 1914.

[No. 3667.]

NATIONAL FUEL COMPANY V. MACCIA.

1. **NEGLIGENCE—*Example.*** The approach to the interior of a coal mine was by a tunnel of irregular width. Miners were passing there, frequently, in going to and from their work. The tunnel was unlighted. At places it was so narrow that the cars by which the coal was removed, or the coal loaded upon them, grazed the wall. The cars were operated at irregular times, without any signal given, and without any brake or other device for stopping them. The driver of a trip of six cars started them with his back in the direction of their motion, and so continued until a miner ascending the tunnel was struck and killed in one of the narrow parts of the tunnel. The light in the miner's cap would have been seen if the driver had been looking. *Held* that the driver was negligent.

2. **MASTER AND SERVANT—*Servant's Assumption of Risk.*** Under Rev. Stat., sec. 2065, the servant never assumes the risk of the negligence of a fellow servant, unanticipated, and which he has no reason to anticipate.

3. — ***Contributory Negligence of Servant—Burden of Proof.*** Under Rev. Stat., sec. 2065, contributory negligence of the servant is an affirmative defense, and the burden of proof is upon the master.

4. **EVIDENCE—*Credibility of Witness,*** is for the jury. Their determination will not be reviewed upon appeal.

5. — ***Corroborating Witness—Frame of Question.*** Action for the death of plaintiff's husband attributed to defendant's negligence. A boy examined for defendant gave testimony tending to show contributory negligence on the part of the deceased. On cross-examination certain favors extended by defendant to the parents of the witness were shown. Another witness was asked, by way of corroboration of the boy, whether "*after the accident*" the boy made a statement in reference to the occurrence. *Held* that inasmuch as it did not appear, and no attempt was made to show, that the statement, whatever it was, antedated the receipt of the favors by the boy's parents, it was properly excluded.

6. **DEATH—*Damages—Excessive.*** The award of \$3,500 for the death of plaintiff's husband *held* not excessive, in view of the testimony as to his age, exemplary habits, and earning capacity.

Appeal from Boulder District Court. HON. JAMES E. GARRIGUES, Judge.

Mr. WILLIAM E. HUTTON, Mr. CHARLES B. WARD and Mr. BRUCE B. McCAY, for appellant.

Mr. HORACE N. HAWKINS, for appellee.

CUNNINGHAM, Presiding Judge.

Appellee, plaintiff below, brought her action against the Fuel Company to recover damages occasioned by the death of her husband, Mike Maccia, an employe of the Company, and had judgment for \$3,500. The defendant company was operating a coal mine in Boulder County, in which Maccia was working as a common miner. The mine was operated through a main tunnel or haulway, running north and south, entries being driven easterly and westerly at right angles from this haulway into the coal body. The coal extracted from the entries was transported from the entries in cars down the haulway to a shaft, and thence by cage to the surface. While walking northward from the shaft in the haulway, Maccia was run upon by a trip or train of cars, loaded with coal, which was proceeding southward to the shaft, and received injuries, from which he shortly died. There were six cars in the trip, and attached to the cars was a mule, the mule and cars being in charge of one Benton, a driver. The track on which the cars of coal were being hauled was laid on a grade sloping to the south, or towards the shaft, at least for the greater portion of the distance. The driver, Benton, testified that the cars, at the parting or switch where they were placed by other haulers who brought them from the entries, and where he picked them up for the purpose of hauling them to the shaft, were held stationary at that point by means of a sprag or iron bar run through the spokes of the wheel. When it was desired to start the cars down the grade to the shaft, it was Benton's custom to remove this sprag, when the cars would start, by the force of gravity, south upon the track, running upon the mule, which in turn would start off, in order to keep out of the way of the

car, and within ten or twelve feet, such was the character of the grade, the mule was obliged to go on, to use Benton's language, "a good trot." There were no brakes of any sort used to check or regulate the speed of the cars, once the sprag was withdrawn, nor was there any provision made for the control of the mule. No signals of any sort were used in the mine, upon the mule, or about the train of cars, to indicate when the cars were to be started, or that they were in motion. The cars ran upon no certain schedule. The only light in the tunnel or haulway, so far as the evidence discloses, was one electric bulb stationed somewhat back of the parting or switch (that is to say, north of the trip of cars as they stood on the switch before being started for the shaft) except the lights or lamps on the caps of the miners, and on the cap of Benton, the driver. The haulway was of irregular width, and so narrow at certain points on either side of the track as to make it dangerous, if not impossible, at such points, for a man to stand between the walls of the tunnel and the cars as they passed. At the point where Macchia was caught between the cars and the wall, and on the side where he was caught, the evidence shows that the cars, or the coal projecting from them, rubbed the wall of the tunnel. There were some two hundred men employed in and about the mine, all of whom used the haulway at all times of the day for the purpose of passing from the shaft to the various entries on either side of the haulway. There was some evidence that there was an air passage some fifty feet back from the haulway, through which the employes might have walked in going to and from their work in the various entries, but there is no evidence that any of the employes ever used this air passage, and the evidence shows conclusively that the haulway was used with the full knowledge and consent of those in charge of the operation of the mine, by all of its employes, as already stated.

The complaint was in two counts, one charging the master with negligence, and the other, the second count, being under the fellow servant act, section 2065, R. S., and charging Benton, the driver of the trip, with negligence.

1. The evidence shows conclusively that immediately before pulling the sprag from the cars and starting the trip down grade on its way to the shaft, Benton was talking with another driver on the parting, who was in the act of starting with another trip of cars into an entry; that Benton kept his back towards the shaft while thus talking, and while pulling the sprag, and maintained this position after the cars had started, for he testified that he climbed upon the cars as they started, and rode backwards, with his back to the shaft and towards Macchia, who was walking up the grade from the shaft, until the very instant of the collision. The evidence further shows that for considerably more than one hundred feet immediately preceding the collision, Macchia had been walking up the grade, on a straight track, and would have been, by reason of the light in his cap, in plain view of Benton had the latter been paying any attention whatever to conditions down the track in front of the mule. Owing to Benton's position on the car, and owing to the lack of brakes and signals, his conduct constituted negligence quite as gross as though he had blown out his lamp before starting the cars, and had started the mule and cars down the grade unaccompanied by anyone. Under such circumstances, it is idle to contend that there was not abundant evidence to warrant the jury in finding Benton guilty of negligence, no matter what their findings may have been as to the negligence of the mining company in not properly equipping its mine with safety devices.

2. It is contended by defendant that Macchia assumed the risk, not only of the failure of the mining

company to adopt proper safety devices, but also of the negligence of his fellow servant, Benton. We shall not discuss the doctrine of assumed risk as applied to the first count of the complaint charging negligence against the master, but shall limit our consideration of this question as applied to the second count of the complaint, which is based upon the fellow servant statute, section 2065, R. S. In *Pearl v. Omaha & St. L. Ry. Co.*, 115 Ia., 535, 88 N. W., 1078, it is said:

“Complaint is made of the court’s omission to give an instruction on the assumption of risks. There was no occasion for doing so. An employe never, under our statute, assumes the risk of the future, unanticipated negligence of his co-employes of a railroad.”

And, in *Hackett v. Wisconsin Ry. Co.*, 141 Wis., 464, 124 N. W., 1018, 45 L. R. A. (N. S.), 664, it is said:

“Under the existing statutes in this state, a railroad employe, in the line of his duty, does not assume the risk of negligence of his co-employe, excepting, perhaps, in the case where he knowingly, voluntarily, and unnecessarily submits himself thereto.”

Other authorities have stated the rule even more strongly against the contention here made in behalf of appellant. See *Rhodes v. Des Moines Ry. Co.*, 139 Ia., 327, 115 N. W., 503; *Phinney v. I. C. Ry. Co.*, 122 Ia., 488, 98 N. W., 356. Under none of the authorities above cited can it be ruled, on the circumstances of this case, that Macchia assumed, as a matter of law, the risk of the negligence of the driver, Benton.

3. The trial court instructed the jury that the burden of proving contributory negligence was placed upon the defendant company. Counsel for defendant predicates error on this instruction, and upon the theory that since one of the counts in the complaint was based upon the fellow servant statute, and since said statute gives a remedy denied by the common law, that he who would

invoke the aid of the statute must plead and prove that he, the plaintiff (or, in this case, the deceased plaintiff's husband), was in the exercise of due care. In other words, that while this instruction of the court was correct as applied to the first count, it was wrong as to the second count, which was based upon the statute, and the court made no limitation as to the application of the instruction. There appears to be authority supporting counsel's contention, but the same is contrary to the rule laid down in *Lorimer v. Ry. Co.*, 48 Minn., 391, 51 N. W., 125; *Dugan v. Chicago Ry. Co.*, 85 Wis., 609, 55 N. W., 894, and *Andrews v. Chicago Ry. Co.*, 96 Wis., 348, 71 N. W., 372. Under statutes similar to our own, the Minnesota and Wisconsin courts have held that it was not within the purpose of the fellow servant act to change the rule as to the burden of proving contributory negligence, and these courts maintain that the phrase, "without contributory negligence on his part," appearing in their acts, which is similar to the phrase, "being in the exercise of due care," appearing in our act, was obviously inserted in the statute from motives of caution, that it might not be supposed that the declared liability of the master was intended to be absolute, and without regard to any negligence of the complaint contributing to the injury. The Wisconsin and Minnesota rule meets with our approval.

4. The haulway or tunnel, which has heretofore been described, was separated into compartments by a door, which was in charge of a boy some fourteen years of age, whose sole duty, so far as the evidence discloses, was to open and close this door in order to permit footmen and the coal hauler to pass from one compartment to another. The lad in charge of this door is denominated a "trapper boy." He testified on the trial that on the day of the accident, when he let Macchia pass through the door on his way from the shaft northward

towards the switch or parting where the coal cars were evidently then standing, "I told him to wait there, for Ernie would be out with a trip, and he said he was in a hurry." By Ernie is meant Ernest Benton, the driver of the trip. Counsel for appellant appear to place great reliance upon this testimony, and insist that it shows conclusively, as a matter of law, that Macchia was guilty of contributory negligence in not heeding the suggestion of the trapper boy and remaining at the trap door until Benton had passed by with the trip of cars. We are unable to perceive how it can be urged that Macchia was guilty of contributory negligence in not adopting the suggestion of the trapper boy and remaining at the trap door, without conceding that the tunnel beyond the trap door to the north was inherently dangerous, as it was then being operated. Moreover, it will be observed that the trapper boy did not, according to his own testimony, profess to have any knowledge as to when the driver would be out, or how long Macchia would have to wait for his coming. Indeed, it appears from the record that the trapper boy could have had no knowledge on this subject, since the cars ran at irregular periods, and Benton testified that the time he would have to wait on the switch for his load varied. There is nothing to show that the trapper boy was authorized by the company to act in the capacity of a train despatcher, or that he was accustomed to so act. Moreover, the jury were the sole judges of the credibility of the witnesses, and they may have concluded that the boy's statement as to what he said to Macchia was unworthy of belief. Indeed, there was some evidence in the record tending to affect the credibility of McNulty, the trapper, and this leads us to the consideration of another contention urged by appellant.

5. On cross-examination of the boy, McNulty, counsel for appellee, brought out the fact that the company

had permitted him, and his parents, to remain on its property after having ejected or expelled their other employes therefrom as the result of a labor difference which occurred subsequent to the accident resulting in Maccia's death. This was doubtless done for the purpose of discrediting McNulty's testimony, by showing bias and prejudice in favor of the company, or at least, motives for such bias. In order to break the force of this admission by McNulty, 'i. e., the admission that he and his parents had been thus favored, and, therefore, it might be inferred, he had been induced by motives of gratitude to testify falsely as to having warned Maccia, counsel for defendant asked O'Neill, the superintendent of the mine, this question:

"Q. I will ask you whether Martin McNulty made any statement to you after the occurrence of the accident to Mr. Maccia, with reference to a conversation at the door near the point where he was employed as a trapper boy?"

Counsel for plaintiff made the following objection to this question:

"I object as incompetent and immaterial, and as an attempt to bolster up the evidence of the witness, as to which no evidence has been introduced to attack it."

The record shows the objection was sustained, and the defendant excepted. Upon this ruling defendant predicates error, and urges here that it was manifestly prejudiced in not being permitted by the court to show that McNulty had made the same statement with reference to his warning to Maccia to Superintendent O'Neill, immediately after the accident and before any favors which might have influenced him had been extended to him or his parents. It will be observed that the question propounded to O'Neill does not at all indicate when McNulty made any statement to him, if it be assumed

he did make a statement, except that it was, "after the occurrence of the accident." As the question does not fix the time of the supposed statement, it may well have called for a conversation between McNulty and O'Neill after, instead of before, the favors had been extended to himself and his parents. The record does not disclose that counsel for appellant attempted, at the time objection was made to the question, to enlighten the court as to what purpose or object they had in propounding it. They contented themselves with taking an adverse ruling and merely noting an exception to the same. Furthermore, under our ruling in *City of Pueblo v. Bradley*, 23 Colo. App., 177, 128 Pac., 888, the defendant is in no position to assign error on the ruling of the trial court. See authorities there cited.

We have by no means discussed all of the contentions urged on behalf of defendant, nor can we do so without unduly prolonging our opinion. We have contented ourselves with a discussion of those which we think are of sufficient seriousness to warrant reference. The instructions, as a whole (and the jury was warned by the trial court that the instructions must be considered together and as a whole), were fair to the defendant—some of them over liberal to it—and we observe no prejudicial error in the admission of the testimony. The verdict of the jury precludes any contention of passion or prejudice, or undue sympathy on its part, in view of the fact that it returned a verdict for but \$3,500, whereas, the maximum under the statute permitted a verdict of \$5,000. Indeed, when the age, the exemplary habits, the earning capacity and the industry of the deceased, as disclosed by the record, are considered, we are obliged to conclude that the jury acted with unusual moderation, and we are not disposed to disturb its verdict.

Counsel for defendant say in their brief: "The court nor the jury can properly take judicial notice of how a coal mine ought to be operated, or as to what is practicable and good usage among prudent operators." In a measure, of course, this is true, but only in a measure. Where the negligence is gross, as we believe the evidence in this case discloses it was, neither courts nor juries may properly shut their eyes, forswear their own judgment, and await the coming in of expert testimony concerning some physical fact, or omission of duty, patent to everyone.

Judgment Affirmed.

Decided February 11, A. D. 1914. Rehearing denied March 9, A. D. 1914.

[Nos. 3630, 3631.]

THE PEOPLE OF THE STATE OF COLORADO V. THE ESTATE OF
WILLIAM J. PALMER, DECEASED.

1. **INHERITANCE TAX—Nature of.** The inheritance tax is not a tax upon property, but upon the right to succeed to property; it is not a debt of a decedent nor a charge upon his estate. It accrues, and is payable, immediately after the death of the ancestor or testator, and his estate must be appraised at, or as of, that time. The tax accrues at the decease, though payment may not be exacted until it is determined what has passed under the will or by descent.

Though, by statute, for convenience and certainty of collection, the personal representative is required to discharge the tax, it is in fact paid by the heir or devisee, and not by the estate.

The heir or devisee may discharge it from his own funds.

2. — **Deductions—Statute Construed.** Under the statute (Acts 1902, 3, 24, Rev. Stat., secs. 5551, 5553, 5554) neither moneys expended by the executor for the upkeep of the home of the decedent, nor moneys expended to discharge an inheritance tax imposed by the state upon personalty located there, are to be deducted from the estate in the computation of the tax.

El Paso District Court. Hon. W. S. Morgan.

HON. JOHN T. BARNETT, Attorney General, Mr. JAMES GRAFTON ROGERS, Assistant, Hon. FRED FARRAR, Attorney General, Mr. LESLIE E. HUBBARD, Assistant, for appellants.

Messrs. HENRY C. HALL, J. L. BENNETT, JAMES OWEN, for appellee.

MORGAN, Judge.

The lower court, on appeal from the county court, allowed a deduction, before the inheritance tax should be computed, of \$25,000, expended by the executors during the administration for the "upkeep" of the home of the decedent, devised by the will, and also, \$33,000, expended in the payment of a "transfer tax" demanded by the states of New York and New Jersey, on personal property located in those states, bequeathed by the will. Neither of these deductions should be made before computing the tax, because the property passed, as provided by statute, at the time of the death, and before the expenses were incurred, and such expenses were obligations of the legatees and devisees, and not of the decedent or of the estate and not necessary expenses of administration. The \$25,000 item is so clearly a charge against the devisees expended to preserve the property devised to them and which, as provided by the statute, vested in them, and to be appraised as of the time of the death, that reference to it is not necessary except as it may be involved in the discussion of the other item.

The following predesignate postulates, found in the authorities and statutes cited thereafter, will assist a logical demonstration and solution of the proposition involved:

(a) Our statute of 1902, in force at the time of the death, contains the following material provisions:

"All property, real, personal and mixed, which shall

pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state * * * shall be and is, subject to a tax at the rate hereinafter specified to be paid to the treasurer of the proper county for the use of the state, and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed."

"All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent."

"Any administrator, executor or trustee having any charge or trust in legacies or property for distribution subject to the said tax shall deduct the tax therefrom, or if the legacy or property be not money he shall collect a tax thereon upon the appraised value thereof from the legatee or person entitled to such property, and he shall not deliver or be compelled to deliver any specific legacy or property subject to tax to any person until he shall have collected the tax thereon."

"In order to fix the value of property of persons whose estate shall be subject to the payment of said tax, the county judge shall appoint some competent person as appraiser, to appraise the same at a fair market value."

The material part of statutes of the several states are the same, in effect, as ours; and, although the New York and New Jersey statutes designate the tax as a "transfer tax," they also say that "transfer," as used, shall be taken to include the passing of property by descent, devise, bequest," etc., thus making those statutes the same as ours.

(b) An inheritance tax is not a tax upon property, but on the right to succeed to the property.

(c) It is a tax which the person who inherits is

liable to pay and is not a debt or charge against the decedent or the estate.

(d) The usual provisions of such statutes (that the executor or administrator must collect and pay the tax) is no proof or indication that the estate of the deceased is in any way liable for the tax, but enacted to insure the payment of it.

(e) Such tax is payable upon personal property in any state where the personal property is located at the time of the death of the decedent, if the statute of such state so provides, and a tax may be collected there, as well as in the state where the deceased died, and where the heir resides.

(f) The tax cannot accrue until the death of the decedent, but does accrue, and is payable, immediately after the death, at which time it must be appraised for such purpose; and the accruing of the tax is not postponed until the estate is settled, although payment may not be exacted until it is determined what has passed under the will or the law. Several of the states have provided by statute that bond may be given for the payment thereof in case it is not paid immediately after the death of deceased. Our statute provides for such a bond, although it specifically says, "it shall be due and payable at the death of decedent."

(g) Our statute also provides that our state may collect the tax on personal property located in this state although the decedent may have lived and died in another state where a similar tax existed, exactly the same as the New York and New Jersey laws provide, and which are involved in this particular instance.

(h) Some statutes provide that such tax against a non-resident is to be collected only in case the statutes of the state where the non-resident lives has the same provision, thus recognizing a kind of reciprocity.

(i) A tax cannot be said to *reduce* the *value* of any property; an inheritance tax, not being a tax upon the property but a tax upon the right to take it, cannot be said to *reduce* the *value* of the *property* that *passes*.

(j) The entire property that passes at all passes immediately upon the death, and as the *heir* must pay the tax, and not the *estate*, the heir receives the entire property, and may pay the tax out of his or her personal funds, but, for convenience and certainty of collection, it is provided that it must be paid by the executor or administrator.—*In re Inheritance Tax on Macky's Estate*, 46 Colo., 79, 102 Pac., 1075; *Brown v. Elder*, 32 Colo., 527, 77 Pac., 853; *People v. Griffith*, 245 Ill., 532, 92 N. E., 313; *In re Gihon*, 169 N. Y., 443, 62 N. E., 561; *Hooper v. Shaw*, 176 Mass., 190, 57 N. E., 361; *In re Hite's Estate*, 159 Cal., 392, 113 Pac., 1072, 32 L. R. A. (N. S.), 1167, Ann. Cas. 1912C, 1014; *In re Elting*, 78 Misc. Rep., 692, 140 N. Y. Supp., 238; *People v. Union Trust Co.*, 255 Ill., 168, 99 N. E., 377, Ann. Cas. 1913D, 514; Sess. Laws Colo., 1902, pp. 49-57; 3 Rev. St. N. Y., Banks & Bros. (9th ed.), pp. 2854-2867; 4 Comp. St. N. J. 1909-10, pp. 5301-5311; Supp. to Pub. St. Mass., pp. 513-516; 30 U. S. St. at Large (June 13, 1898), c. 448, pp. 464-466; Ill. Act 1895 (Acts 1895, p. 301; Hurd's St. 1899, c. 120).

With these premises in view it must be concluded that when the New York and New Jersey securities were sent to the executors they had the *same value* when they reached them that they had in the state from which they were sent, and would have to be so appraised; and if the value was in any way decreased it was by the act of the heir in the payment of the tax charged against the heir, by those states, and not by any act of the decedent or the estate, because neither the decedent nor the estate owed those states anything, and the payment, by the executors, of the tax due those states by their heir, was the payment of a debt or charge against the heir, the

same as the payment of the inheritance tax of this state. Everything bequeathed or devised passes to the heir, and nothing is deducted from that which passes, or ought to be deducted; not even the debts of the decedent, or expenses of administration, are deducted from that which passes, but in contemplation of the law, before the passing takes place, as nothing can pass until the debts are paid, including the debts of the estate such as expenses of administration. The statute says that the tax is to be paid on the value of everything that *passes by the will* or the law, and not on what the heir actually *receives*, although it makes no difference, because the heir *actually* receives, everything that is bequeathed or devised; nothing can be devised or bequeathed except what is left after the obligations of the decedent and expenses of administration are paid.

When the property was sent from New York and New Jersey to Colorado, there was nothing deducted by the New York or New Jersey authorities. The law provides that the tax must be *paid*, not *deducted*, from the property; and in this particular case the \$33,000 was not deducted from the property; it was sent *in toto*, and was received by the executor, just as other personal property would have been received, with the tax paid, of course, by the executor for the legatee, but unmolested, and intact, so far as the value was concerned, and was so passed, the legatees thus receiving the bequest in its entirety. If the legatees are subject to the tax, they must pay it, but such payment does not reduce the value, and if it should, such reduction is in no way chargeable to the estate, as it was charged by those states to the legatees. Some legatees or beneficiaries under a will, as in the Mackay estate, *supra*, are not subject to the tax, and in such case the property passes in the same way, but the beneficiary does not have to pay anything for the right to receive it. If the tax was payable by the estate, as expense of admin-

istration, the Mackay decision would have been the other way, and the tax would have been paid to the state. The only theory upon which payment of the inheritance tax on the \$33,000 or the \$25,000, may be avoided is that such payment is a *necessary and compulsory expense* of the executor or of the estate, *aside* from the provision of the law that he shall *collect* it. The fact that the statute makes no provision whatever even for expenses of administration indicates very clearly what the legislature intended, and that is, that the heir should pay the tax on the inheritance, that passed, on the death of the testator; however, all of the courts require that the expense of the administration must be paid, the same as debts of the decedent, before computing the tax, that is, in contemplation of law, before the tax attaches. Justice Holmes, in the Massachusetts case, *supra*, went a little farther in behalf of the heir, and allowed a deduction of a similar tax paid to the United States, and based his conclusion upon the view that "the value is to be taken" upon the property "which the legatee actually would get were it not for the State tax imposed," meaning the Massachusetts inheritance tax. Our law, however, specifically provides that the tax "shall be due and payable at the death of the decedent," a provision not contained in the law of Massachusetts or of the United States. Conceding that the courts have acted wisely in allowing the expenses, in proving the will, administering the estate and perfecting the inheritance, it is to be noted that the courts have been very careful not to *extend* such deductions beyond the ordinary, actual and necessary expenses of the administration, and such other provisions as the law may require, upon the ground that such deductions "do not pass within the meaning of the law."—*In re Hite's Estate, supra*. It seems that the absolute physical possession of these securities was not necessary on the part of the executors, but was only necessary on the part

of the legatees, and an expense which *they* should pay and *not* the *estate*.

It seems that the administration, including appraisement, collection of this tax, and absolute distribution could have been effected without removing the property from New York or New Jersey; the tax of those states could have been paid by the legatees when they assumed ownership of the property there, proving such ownership by an order of the court administering the estate.

It is concluded that the payment of the inheritance tax of New York and New Jersey is upon the same footing as the payment of the inheritance tax of this state and merely increases the tax the legatees have to pay for the privilege of succeeding to the property that passes under the law to them. So long as other states, as well as this, require an inheritance tax to be paid upon personal property located therein, while the decedent and the beneficiary reside in a different state and must pay the same kind of a tax there, and the courts continue to uphold such species of double taxation, then, just so long will it be the duty of the courts to hold that the payment in one state is on the same basis as the payment in another, and if the tax be not deducted in the state where the principal administration is made before appraisement and computation, then, the same kind of a tax paid in another state can not be deducted. The wisdom of such legislation is with the law-making power and not with the courts.

The judgment is reversed.

[No. 3944.]

NORDLOH V. COUNTY COMMISSIONERS OF ADAMS COUNTY.

COUNTY COMMISSIONERS' BOND—*Liability—Statute Construed*. Section 1219 of the Revised Statutes provides that no account shall be allowed

by the Board of County Commissioners unless "made out in separate items, and the nature of each item stated." Sec. 1251 declares that any member of a board of county commissioners who knowingly acquiesces in any misappropriation of the funds of a county * * * or the allowance of bills "which are not legally allowable * * * shall be liable upon his bond for all damages, both proximate and remote." In an action upon a county commissioner's bond it was held in the court below that consent to the allowance of a bill not itemized as required by the section first quoted, rendered the commissioner and his sureties absolutely liable, no matter how just the claim might be. This construction of the statute rejected, and held that such an interpretation of sec. 1219 would necessarily render sec. 1251 highly penal in character, contrary to what was resolved in *Morris v. Board of Commissioners*, ante.

Error to Adams District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. N. WALTER DIXON, Mr. GEORGE ALLAN SMITH, for plaintiffs in error.

Mr. OMAR E. GARWOOD, Mr. GEORGE A. GARARD, Mr. ERNEST R. PROEMMEL, for defendants in error.

CUNNINGHAM, Presiding Judge.

The pleadings in this case, and the facts involved, are in all substantial respects the same as in Case No. 3913, *Morris v. Board of County Commissioners*, ante 416, 139 Pac., 582, decided at this term, and the opinion in this case will be controlled largely by the opinion in the Morris case. As in the Morris case, so in this, the judge of the trial court directed a verdict against the defendant Nordloh. The bill for services of George Allan Smith (being the same bill which was involved in the Morris case) was not itemized; at least not with the fullness required by section 1219, R. S., which reads, in part, as follows:

"No account shall be allowed by the board of county commissioners unless the same shall be made out in separate items, and the nature of each item stated, and where no specified fees are allowed by law, the time

actually and necessarily devoted to the performance of any services charged in such account shall be specified;" etc.

The trial judge seems to have concluded that the requirements of section 1219 were mandatory, and that whenever a commissioner votes to allow a bill, no matter how just it may be, and the bill is allowed, the commissioner so voting thereby becomes conclusively liable to the county under the provisions of section 1251, R. S. The remarks of the trial court immediately preceding the direction of the verdict, make it clear that he was controlled entirely by this interpretation of the statutes. The construction placed by the trial court upon section 1219, in connection with section 1251, can not be upheld, for such construction would make section 1251 penal beyond all question, and if penal, the suit being brought more than a year after the cause of action accrued, if any accrued, was barred by the statute of limitations, and the plea of the statute of limitations which was interposed on the trial by the defendant ought to have been allowed. But for reasons stated in the Morris case, we do not think section 1251 is penal. Having arrived at the conclusion that the requirements of section 1219 were mandatory, and that its non-observance by the defendant left him entirely without a defense, or a right to defend, practically all of the pertinent testimony offered by Nordloh, was, upon the objection of counsel for plaintiff, excluded. The whole error of the trial court, so far as the record discloses, being clearly traceable to the wrong construction placed by it upon the aforesaid sections of the statute, it is not necessary that we should take up the various assignments of error and discuss them in detail.

The judgment of the trial court is reversed, and the case remanded for further proceedings in harmony with the views herein expressed.

Reversed and Remanded.

[No. 3775.]

CITY OF COLORADO SPRINGS V. CORAY.

1. *TRIAL—Directing Verdict—Testimony of Party in Interest Uncontradicted*, is not conclusively presumed to be true. Its credibility must be left to the jury. To direct a verdict upon the assumption of its truth, is error. Especially is this so, where, in addition to the pecuniary interest, it appears that the party so testifying is animated by a sense of wrong imputed to the adversary party, his memory appears frequently at fault, for a period of years he failed to assert the claim which is the foundation of the action, and then presented the claim for a much smaller sum.

2. *MUNICIPAL CORPORATIONS — Contracts for Public Improvements*. Under Rev. Stat., sec. 6579, no contract for the construction of a public improvement of any kind can lawfully be entered into by a municipal corporation except after advertisement, and then to the lowest responsible bidder.

And under Rev. Stat., sec. 6675, the resolution or order to enter into the contract must be adopted with the concurrence of a majority of the members-elect of the council or board of trustees, and the ayes and nays must be recorded. The statute is mandatory and cannot be effectually waived. Every such contract must be express.

Services rendered in the construction of a public improvement under a contract entered into without the formalities required by the statute afford no action against the municipality, no matter how valuable such services may be, and though the corporation retains the results thereof.

A contract for skilled and technical services, e. g., the employment of one as superintendent of the construction of a public building, is within the statute.

3. — *Estoppel*. Where the statute has not been observed, the contract is void, and the municipality is not estopped to deny liability.

4. — *Ratification*, of a contract of the character prescribed by the statute requires the same formality as the making thereof. A resolution of the city council accepting the resignation of the party "as superintendent of construction" has not the effect to ratify his employment without the observance of such formalities.

5. — *Pleading—Complaint*. A complaint seeking to charge a municipal corporation upon a contract, which, by a statute, must be express, should aver an express contract. No action lies upon a *quantum meruit* for services rendered under a contract entered into otherwise than according to the prescriptions of the statute.*

*Syllabus by KING, J.

6. — *Statute Construed.* The phrase "responsible bidder" in Rev. Stat., sec. 6579, is not limited to pecuniary responsibility, but extends as well to the skill, experience and integrity of the party bidding.

But it has no application to services of superintendents and the like, rendered by a salaried officer pursuant to statute.

7. INTEREST—*Municipal Corporations* cannot in any manner be made liable for, or legally pay, interest upon an account for services rendered. BELL, J.

Appeal from El Paso District Court. HON. JAMES OWEN, Judge.

Mr. P. M. KISTLER for appellant.

Messrs. SCHUYLER & SCHUYLER, for appellee.

KING, J., delivered the opinion of the court.

January 8, 1908, E. G. Coray, the appellee, brought his suit to recover from the City of Colorado Springs the sum of \$2,360 for services alleged to have been rendered by him for the city between May 6, 1902, and April 20, 1903. After hearing the evidence, the court instructed the jury to return a verdict in favor of the plaintiff in a sum to be found by it as the reasonable value of his services, computed at not less than five dollars per day, nor more than eight dollars per day, for a number of days not less than 293 nor more than 295, together with interest from April 20, 1903. Verdict was accordingly returned for the sum of \$3,113.12, upon which judgment was rendered.

It is urged that the court erred in directing a verdict; that thereby the court invaded the province of the jury and took from it the question of the credibility of the plaintiff, upon whose testimony alone the alleged fact of employment, manner of employment, and time of service, rested. As to those essential matters the testimony of plaintiff was neither disputed nor corroborated by any

other witness. The general rule that the trial court should not in its charge to the jury treat as doubtful and open to consideration a matter concerning which there is no dispute, and that the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses, is conceded; but it is insisted that this rule in no manner conflicts with or militates against the equally well established rule, that the court should, not in its charge, assume as undisputed and proven, a material fact in issue by the pleadings, where the only testimony in support thereof is that of the plaintiff, or some other person directly interested in the result of the suit. This contention is sustained by abundant authority and satisfactory reason.—*Ward v. Atkinson*, 22 Colo. App., 134, 123 Pac., 120; *Turner v. Grobe*, 24 Tex. Civ. App., 554, 59 S. W., 583; *Munoz v. Wilson*, 111 N. Y., 295, 18 N. E., 855; *Sonnentheil v. Brewing Co.*, 172 U. S., 401, 19 Sup. Ct., 233, 43 L. Ed., 492; *Elwood v. Western Un. Tel. Co.*, 45 N. Y., 349; Thompson on Trials, sec. 2287. A few quotations from the foregoing cases will suffice to justify our conclusion.

“Where a plaintiff testifies in his own behalf, his interest in the result of the suit may be considered and the questions of his credibility and the truth of his statements should be left to the jury. It was error to assume in the charge that plaintiff’s statements on the stand were true.”—*Turner v. Grobe*, *supra*, page 557 (59 S. W., p. 85).

“And while the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses, the very courts that lay down this rule qualify it by saying the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.”—*Sonnentheil v. Brew-*

ing Co., supra, page 408, 19 Sup. Ct. R., 236, 43 L. Ed., 492.

“The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. The general rules laid down in the books at a time when *interest* absolutely disqualified a witness, necessarily assumed that the witnesses were *disinterested*. That qualification must, in the present state of the law, be added.”—*Elwood v. Western Un. Tel Co., supra*, p. 554 (45 N. Y., 554).

The discussion of this question by Cunningham, J., in *Ward v. Atkinson, supra*, makes any further discussion of it here unnecessary. But under the condition of this record, the rule contended for by appellant is especially applicable. It appears from the plaintiff's own testimony that during the time he claims to have been engaged in performing the services for which suit is brought, certain controversies between him and the city arose and were bitterly contended for and contested. That thereby his relations with the city became so strained that he resigned his official position as building inspector, and from his alleged employment, and for nearly three years thereafter presented no claim for services as superintendent, at which time he filed a claim for five dollars per day instead of eight as demanded in the suit. For those reasons, the credibility of plaintiff's evidence against the city might be regarded as affected by his animus as well as by his pecuniary interest in the result of the suit. It also appears from the evidence that plaintiff's memory was not clear, and he required, or at least received, much assistance from his counsel by leading questions and references to the pleadings to refresh his memory. In directing the verdict for the plaintiff, we think the court committed reversible error.

II.

A more substantial and difficult question is presented by the objections made by defendant at the outset, persisted in throughout all the proceedings, and raised by the assignments of error, that the complaint does not state a cause of action against the defendant, and that the evidence is not sufficient to fix a liability upon the city, or sustain a judgment in any amount in favor of the plaintiff. The action was instituted to recover upon *quantum meruit* the reasonable value of services, as superintendent of construction of a city hall, alleged to have been performed by the appellee at the instance and request of the defendant, made by and through the chairman of its duly authorized committee on public grounds and buildings, that portion of the complaint by which liability is sought to be charged being as follows:

“That on, to-wit, the 6th day of May, 1902, at the instance and request of the defendant made by and through the chairman of its duly authorized and acting committee on Public Grounds and Buildings, the plaintiff commenced work for the defendant as superintendent of the construction of a certain building then in process of construction by the defendant in the City of Colorado Springs and known as the City Hall, and at the instance and request of the defendant and with its acquiescence and approval, by and through its duly authorized committee on Public Grounds and Buildings, and also with the acquiescence and approval of the mayor of said city, and each and every member of the city council of the defendant city, the plaintiff continued in said employment, and in the service of the defendant city, under the instruction of said committee on Public Grounds and Buildings in the capacity of superintendent of construction of said City Hall for the period of two hundred and ninety-five days. That the said work and service so performed by the plaintiff and so accepted, received and

approved by the defendant, were reasonably worth the sum of eight dollars (\$8) per day. That by reason of the facts herein alleged, the defendant on the 20th day of April, 1903, became, ever since has been and now is indebted to the plaintiff for said work and services in the sum of two thousand three hundred and sixty dollars (\$2,360).''

After its demurrer to the complaint was overruled, the appellant answered, and among other defenses, including the general denial, alleged that the contract of employment upon which suit was brought was *ultra vires*. The contention made by appellant, the determination of which is decisive of this case, is in effect that the suit is upon an implied contract for the reasonable value of work performed or services rendered in the construction of a work of public improvement, whereas such work can only be done and liability attach to the city by express contract let upon bids. That the complaint upon its face and the evidence offered in support thereof show that the work was not done, or services rendered, under an express contract, nor to the lowest responsible bidder, nor after due advertisement; that the employment of the plaintiff, if made, and the services, if rendered, as alleged by him, were without authority of law. Therefore as to such he was a mere volunteer, and cannot recover against the corporation.

The law governing the liability of municipal corporations of this state in suits upon contracts, express or implied, for services rendered the city was declared by the supreme court in *Durango v. Pennington*, 8 Colo., 257, 7 Pac., 14. That case has not been overruled nor modified, and hence, so far as applicable to the facts of the case before us, is controlling, and, inasmuch as it is cited by counsel for both sides, it may be regarded as so considered by them. In that case, Mr. Justice Beck, speaking for the court, said:

“We understand the law to be well settled, that when the mode of proceeding in respect to transactions of this nature” (public improvements) “is prescribed by law, or in the charter of a municipal corporation, such mode must be strictly pursued by the corporation in relation to the awarding and making of contracts, or no liability is thereby incurred. The party dealing with a municipal body is bound to see to it that all mandatory provisions of the law are complied with, and if he neglects such precaution he becomes a mere volunteer, and must suffer the consequences.—*Zottman v. San Francisco*, 20 Cal., 96 [81 Am. Dec., 96]; *Brady v. Mayor*, 20 N. Y., 312; *Murphy v. City of Louisville*, 9 Bush [Ky.], 189; *Steckert v. City of East Saginaw*, 22 Mich., 104.

“It follows from the foregoing rules of decision, that if the defendant corporation was limited by law to a specified mode of contracting indebtedness for the making of street improvements, and such mode was not observed in the awarding and making of the contract in question, nor in its subsequent ratification, that no recovery thereon can be had against the corporation. In such case it matters not that the work may have been well done, and that the defendant may have the full benefit thereof.”

See also *Sullivan v. Leadville*, 11 Colo., 483, 18 Pac., 736.

At the time the opinion in the case of *Durango v. Pennington*, *supra*, was delivered, there was no statute which required that a public improvement the expense of which was not to be assessed on the owners of adjoining property must be let upon contract. Since that time the following statute has been enacted, and has ever since been in full force and effect:

“All work done by the city in the construction of works of public improvement of every kind shall be done by contract to the lowest responsible bidder, upon open bids, after ample advertisement.”—Session Laws 1891,

p. 383, section 16; section 4442b, Mills' Ann. Stats.; section 7255, 1912 edition; section 6579, R. S. 1908.

Section 4445, Mills' Ann. Stats., also provides:

"On the passage or adoption of every by-law or ordinance, *and every resolution or order to enter into contract* by any council or board of trustees of any municipal corporation, the yeas and nays shall be called and recorded; and to pass or adopt * * * any such resolution or order, a concurrence of a majority of the whole number of members elected to the council or board of trustees shall be required."

In addition to the foregoing statutory provisions, the following ordinance of the City of Colorado Springs was offered in evidence, to-wit:

"Except the ordinary expenditures for the maintenance and repairs in the different departments, no purchase, work or business, involving the expense of more than three hundred (\$300.00) dollars, shall be made, entered or carried out, without a vote of the city council."

There is no room for controversy upon the question that the building of a city hall constituted the construction of a work of public improvement for such city, and, assuming for the present that services rendered as superintendent of construction of said building is a part of the work done by the city in such construction, we think that the services rendered by plaintiff for which he now seeks to impose a liability upon the defendant city comes clearly and fully within the provisions of the sections of the statute hereinbefore quoted, and within the law as announced in *Durango v. Pennington, supra*; that the work done or services rendered by the plaintiff must have been done by express contract between him and the city, and that as a condition precedent to making such contract it must have been awarded to him as the lowest responsible bidder upon open bids after advertisement; and that the resolution or order awarding such contract

must have been made in the manner provided in section 4445, *supra*. The statute is mandatory; compliance with its provisions is jurisdictional, and cannot be waived by the city council. The contract contemplated by the statute is an express contract, not one in which the services to be performed, the term of employment, or compensation to be paid, and other matters, are left to implication.—*Smith Canal Co. v. Denver*, 20 Colo., 84, 36 Pac., 844; 2 Dill. Munic. Corp. (5th Ed.), sec. 796; *Mulnix, State Treas., v. Mutual Benefit Life Ins. Co.*, 23 Colo., 71, 46 Pac., 123, 33 L. R. A., 827. To otherwise hold would operate to defeat the express will of the legislature and the object of the statute.

The evidence in this case clearly shows that no express contract was entered into. Plaintiff testified that one of the aldermen, supposed by him to be a member of the committee on public grounds and public buildings, directed him to begin the superintending or supervising of work that was about to be commenced by the general contractor for the construction of such building, and to see that the interest of the city was protected in that respect, and further stated that such alderman had mentioned the matter to the council the night before; that upon such request the plaintiff commenced his service and continued for a period of two hundred and ninety-five days, during which time he frequently reported to the committee on public buildings, to various members of the city council, including the mayor, and to the architect of the building. No term of service nor compensation was at any time mentioned; and no claim made that any contract, written or oral, was entered into, or that any order was made by the city council, as such, awarding the contract to the plaintiff or directing him to perform any services with regard to said building, or that bids for such work were ever called for or advertised, or that any order was made or action taken by the city council

recognizing the employment of the plaintiff, or that he was performing services for the city, except a motion made after the alleged services had been performed, accepting the resignation of the plaintiff as building inspector, in which was included his resignation from employment as superintendent of construction. This motion falls far short of such ratification of the alleged employment as is required. The ratification of an invalid contract, where an express contract is necessary to bind a municipal corporation in the first instance, and where the contract is required to be made in a specified manner, requires the same formalities necessary to be complied with in the making of a valid contract. *Durango v. Pennington, supra*. No such ratification is set forth in the complaint, nor shown by the evidence, and it seems clear that the plaintiff is bound by the law as declared by the supreme court, that in dealing with a municipal body he is bound to see to it that all mandatory provisions of the law are complied with, and if he neglects such precaution he becomes a mere volunteer, and must suffer the consequences, without regard to the fact that his work may have been well done and that the defendant has had the full benefit thereof.

But it is said by appellee that the city did not plead the invalidity of the contract relied upon, and that therefore it must be held to have waived it. We think that where a mandatory statute requires the making of an express contract for work done by the city, the complaint which seeks to recover upon a liability for such work does not state a cause of action unless it shows that it is based upon an express contract.—*Sullivan v. Leadville, supra*; *Nash v. City of St. Paul*, 8 Minn., 143, 159 [Gil., 143, 159]; *Smith Canal Co v. Denver, supra*—that such statutory provision is one which the city has no right to waive before or at the time the contract is made, and ought not to be held to have waived it, then nor thereafter,

except by formal ratification, in the absence of an express waiver. Due protection to the interests of the public requires strict application and enforcement by the courts of these statutory provisions.

Sullivan et al. v. City of Leadville, supra, was a suit by contractors to recover from the city for an alleged breach of contract for certain public improvements at a stipulated price to be paid for said work. The court said that it was incumbent upon plaintiffs to establish by proof the fact that the contract was awarded to the plaintiffs, and that it was also "incumbent upon plaintiffs to establish the further fact that prior to the making of such contract, an appropriation had been made concerning the expense thereby incurred.—General Stats., section 3328. If the plaintiffs failed to establish either of these facts, the verdict of the jury should not be disturbed." If it was incumbent on plaintiffs to prove a prior appropriation, it follows, as a matter of course, that it was necessary for them to allege it. While the opinion makes no mention of what is stated in the pleadings, the record discloses the fact that the trial court (then presided over by J. C. Helm, later chief justice of the supreme court) held that the complaint must allege the performance of those acts which by the statute are made conditions precedent to the existence of the power of the city to contract, and that the making of an appropriation to meet the liability incurred was a condition precedent to the existence of the power in the city council to make or authorize the contract. This ruling of the trial court supplements and makes clear the language of the supreme court hereinbefore quoted as to the requisite pleading and proof.

Smith Canal Co. v. Denver, supra, was an action, in the nature of assumpsit upon an implied contract, against the city. In that case, as in this, the complaint alleged no agreement nor promise as to the price to be paid, and

it was contended that upon the facts alleged, the law implies a promise on the part of the city to pay a reasonable price. To this complaint a general demurrer was sustained by the trial court, and its judgment was affirmed. The charter provision there under consideration was that requiring a prior appropriation as a condition precedent to authority of the city to contract. After holding that as a general rule an express contract is required to create a liability against a municipal corporation by contract, and that the charter provision under consideration was mandatory, the court further said, "It is obvious that the legislature intended by this language to protect the city and its tax payers against any and all liabilities *arising upon contract* until the same should be provided for in the mode prescribed by the act itself. * * * The district court did not err in sustaining the demurrer." (In that case it was not urged that the non-existence of an appropriation should have been pleaded as a defense.)

In *Mulnix, State Treas., v. Mutual Benefit Life Ins. Co.*, 23 Colo., 71, 46 Pac., 123, 33 L. R. A., 827, being a suit upon a state warrant, drawn by the state auditor upon the state treasurer, in payment for stationery and other articles furnished to the general assembly and executive departments of the state and used by them, the defense was the illegality of the warrant, said to consist in the fact that a part of the consideration was illegal, because some of the articles furnished were not included in the advertisement, bid or contract as required by law. The constitutional provision involved was this: "All stationery, printing, paper and fuel used in the legislative and other departments of government shall be furnished; * * * and the repairing and furnishing the halls and rooms * * * shall be performed under contract; to be given to the lowest responsible bidder, below such maximum price and under such regulations as may

be prescribed by law.” The act approved February 12, 1879, prescribed the method of advertising and awarding contracts. The court, by Mr. Justice Campbell, held that these statutory provisions were mandatory, and said, “Courts are not astute to discover reasons for holding directory, merely, constitutional provisions manifestly intended as salutary checks upon improvident conduct of governmental affairs.” And in speaking of the requirements of the statute that bids must be submitted and the contract let to the lowest responsible bidder, the court quotes from and approves language of the Illinois supreme court in *Dement v. Rokker et al.*, 126 Ill., 174, 19 N. E., 33, as follows: “Plainly, they (meaning such provisions) are intended as distinct and successive safeguards to protect the state against imposition and extortion. Where the provision of the statute is the *essence* of the thing required to be done, and by which jurisdiction to do it is obtained, it is held to be *mandatory*.” The supreme court in said case also holds that the state could not be made liable as upon an implied contract or *quantum meruit*, even though goods had been received and used, when the prescribed mode of contracting was not observed, and that the contract was *ultra vires*, because executed in express violation of the law, and, being so, was not susceptible of ratification, and the state could not be held liable either upon implied contract or *quantum meruit*. That case may be regarded as conclusive of several questions in this case, namely, (1) that the statute involved is mandatory; (2) that no liability could be incurred except by express contract; (3) that such contract could not be made without bids after advertisement; (4) that suit upon implied contract or *quantum meruit* does not lie, and (5) that this court should not be astute to distort the ordinary meaning of the language of a statute so as to exclude the work of superintending, when the legislation includes *all* work.

We think the complaint did not state a good cause of action, although it might be held good as to any work performed where the statute does not require an express contract. Evidently there was no intention on the part of the city, in pleading its defense, to waive compliance with the statute. The answer alleged that the contract sued on was *ultra vires*. The term *ultra vires*, strictly speaking, has reference to contracts which the city may not under any circumstances enter into, but in a less restricted sense it has reference to contracts entered into without compliance with the statutory provisions requisite to confer power upon the city to make the contract, and as such the plea of *ultra vires* raised the question of the authority of the city to make the contract or incur the liability. Furthermore, objections were at all times made to the introduction of any evidence under the complaint. It is also urged that the defendant was required to prove non-conformity with the terms of the statute. This contention is answered by our holding that the complaint must declare upon an express contract. But if proof thereof was necessary, it clearly appears from the plaintiff's complaint, and his own evidence in support thereof that the law was not complied with. This obviates the necessity of proof by defendant.

It is further urged that if it be conceded that all ordinary work done in the construction of the city hall must have been let by express contract after competitive bids, the services performed by the plaintiff, being of a skilled, technical or professional nature, are not covered by the terms of the statute; that the right of selection by the city council in the exercise of its discretion in the employment of a competent superintendent would be interfered with if the statute as to competitive bidding is made applicable thereto. We know of no authorities which go so far as to hold, or intimate, that the requirements as to an express contract do not apply with equal

force and reason to technical or professional services. There are authorities sustaining appellee's contention, but we are not in accord either with the contention or with such authorities as sustain it. In the democracy of labor there are no privileged classes to which exemption from obedience to the law is extended, or from which its protection is withdrawn. The legislature has created no aristocracy among working men, and the courts should not do so. Time was when there was a distinction made between the workman whose labor was chiefly manual, and the workman whose labor was chiefly mental, and this distinction was recognized by the courts in the application of laws pertaining to mechanics' liens. That distinction has been abolished by statute. We think that contemporary legislation on cognate matters may be appealed to, to sustain our view that under the laws of this state, all labor and all laborers are upon the common plane, with equal rights, duties and liabilities. Prior to 1889 the mechanics' lien act made no reference to skilled or professional labor, and therefore it was doubted whether the services performed by architects and superintendents were included within the class of labor to which liens were given; but by the acts of 1889, 1893, and subsequent acts, it is clearly and definitely provided that all labor and all workmen, including architects, and others engaged in work of superintending, shall be entitled to liens. And under the attachment laws of 1887 attorneys at law have been held entitled to an attachment to collect their fees for services rendered.—*Bogert v. Adams*, 8 Colo. App., 185, 45 Pac., 235. The act of 1891 under consideration in this case, declaring that *all work* done in the construction of works of public improvement shall be done by contract awarded upon competitive bids, etc., was passed soon after the decision in *Durango v. Pennington*, *supra*, and may have been inspired by a knowledge of that decision; but it may well be said that the legisla-

ture had in contemplation its contemporaneous acts placing all work upon a common level before the law. There is no apparent necessity for exempting superintendents of construction from the statutory rule. It is a matter of common knowledge among people who deal in such matters that architects and engineers of unquestioned ability and high reputation frequently, if not usually, offer their services as superintendents of construction—upon a percentage of the contract price, or upon some other basis. It is not claimed that plaintiff was an engineer or architect, or possessed technical skill not possessed by other experienced contractors and builders. It is shown by evidence introduced by plaintiff that there were a number of persons of like qualifications with himself in the city of Colorado Springs, some of whom at least had entered into competitive bids for contracts on the same building. Furthermore, a broad discretion in the selection among bidders is included within a reasonable construction of the statute as to “responsible” bidders. The word “responsible” is not limited to the meaning of pecuniary liability or responsibility, but includes as well skill, experience and integrity; and if the character of the work be such that only one person can be found competent to perform the services, there is no reason to believe that the courts will interfere with the exercise in good faith by a city council of its selection upon the bids submitted.—*City of Denver v. Dumars*, 33 Colo., 94, 80 Pac., 114. However that may be, if the interests of the public require a different provision, it is a matter for the legislature, and not for the courts. When the legislature has by its positive enactment declared the public policy upon a matter of public concern, such act is not subject to review by the courts, and we think the legislature has by mandatory statute declared as the public policy of this state that all work in the construction of public improvements, without reference to its character,

shall be by express contract, upon open bids, and that the superintending of the construction of a public building as in this case is not an exception. Of course, this statute has no application to such work as is performed by salaried officers under a statute or charter which provides that such officers as the city engineer or his assistants and deputies shall supervise and superintend. The statutes and charters are co-existent, and not conflicting.

In support of the judgment of the trial court, the doctrine of equitable estoppel is invoked by the appellee upon the ground that the municipality and the general power of contracting for the services rendered if contracted for in a proper manner, and therefore, the labor having been furnished to the appellant, and induced by positive acts of some of the municipal officers, the municipality should be estopped from denying its liability, or that the contract has been properly made, although in fact made in a manner not authorized. This contention is supported by respectable authorities, and seems to be the established doctrine of the state of Illinois. That doctrine is contrary to the rule as laid down in *Durango v. Pennington*, *Sullivan v. Leadville*, *Smith Canal Co. v. Denver*, and *Mulnix, State Treas., v. Mutual Benefit Life Insurance Co., supra*. It ought not to prevail as against the positive provisions of statutes such as those involved in this case, and to apply it here would amount to a judicial repeal of the statute itself. It would throw down the barriers which the legislature had raised against favoritism, speculation, graft and fraud, and permit a willing city council, and a no less willing contractor, to ignore the statutory safeguards by entering into secret collusive contracts or understandings without competition, or publicity as to terms, and permit a recovery upon no other ground than that labor had been performed or services rendered from which the city has received some

benefit. The statute was not made for the benefit of the city council, nor of contractors, but for the protection of the public against both. Upon the general character and effect of such statutes we quote and agree with the following authorities:

“A provision in a charter, statute, or ordinance requiring a contract to be let by competitive bidding is mandatory, and unless complied with, the contract is void.”—28 Cyc., 1025, and cases cited.

“It cannot be doubted that the true intent of the act * * * and the ordinances passed in pursuance thereof, regulating the awarding of public contracts, is to secure to the city the benefit and advantage of fair and just competition between bidders, and at the same time close, as far as possible, every avenue to favoritism and fraud in its varied forms.”—*Mazet v. Pittsburgh*, 137 Pa. St., 548, at page 561, 20 At., 693, 697.

“We think there can be no doubt that the true intent and purpose of section 4 of chapter 10, *supra*, was to secure economy and protect the public from collusive contracts or favoritism or fraud, and to promote actual, honest, effective competition.”—*Reed v. Rockliff-Gibson Const. Co.*, 25 Okla., 633, 107 Pac., 168, 138 Am. St., 937.

“The reason for such enactments as the one in question is, in the main, to preclude public officers from making contracts in such a way as to enable them to sacrifice the public interests to satisfy favoritism, mere improvidence, or to a corrupt desire for private gain. There is no better safeguard against infidelity of officials in that respect, yet discovered, than to require municipal contracts to be publicly let, the scope of the service to be performed and the terms of payment being so definitely mapped out in advance as to enable persons experienced in respect thereto to estimate with reasonable certainty the actual cost thereof, and to require the award to be made without change in such service or

terms.”—*Chippewa Bridge Co. v. Durand*, 122 Wis., 85, at p. 93, 99 N. W., 603, 606, 106 Am. St., 931.

“The city itself, much less any of its subordinate officers, or committee, had no power to make an agreement to pay for such work on the rule of *quantum meruit*. We may regret that the plaintiff acted unadvisedly, but to assist him in this hard case would lay the axe at the root of the system which imperatively requires all municipal work of this character to be done by the lowest and best bidder.”—*Addis v. City of Pittsburgh*, 85 Pa. St., 379 (referring to an action upon *quantum meruit* in contravention of an ordinance).

In *People v. Flagg*, 17 N. Y., 584, at page 591, Roosevelt, Justice, in speaking of the probable effect of ignoring the statutory provision requiring an express contract on competitive bids, said:

“If this doctrine were to prevail, what would become of the restraints of legislation? The members and officers of the corporation would only have to tell their favorites to go on, without law, and then, by assuming the work, make the obligation binding, not on themselves, but on the tax payers. If contracts, without competition, were thus to be implied, how many express contracts would ever be awarded to ‘lowest bidders’? Even as the law stands, there is abundant evasion. * * * Should the doctrine of implied contracts be also sanctioned, the statute, in all its parts, would soon become a dead letter, and the correction of abuses, however gross, to any degree, however limited, be regarded as a mere utopian dream.”

In the last named case, Comstock, Justice, took the opposite view from that expressed by Roosevelt, Justice, and, commenting on the meaning and scope of the word “work,” said, “It would be an unreasonable and mischievous construction of the statute to apply it to services which require in their proper performance scientific

knowledge or professional skill." That case is not cited as authority, as the court reserved its opinion upon the question as to whether the services were of such a character as come within the statute requiring advertisement, and contract with the lowest bidder, putting the judgment upon other grounds, but to cite with approval the reasoning of Mr. Justice Roosevelt.

While in this case to apply the strict letter of the law may work a hardship upon the plaintiff, it is far better that one man should suffer pecuniary loss than that a rule should be adopted destructive of statutory safeguards, the necessity of which for the protection of the public was never greater than at the present time. If once it becomes thoroughly understood that violation of these statutes will not be tolerated or condoned by the courts, litigation of the kind now before the court will be rare.

Holding the foregoing views, the judgment appealed from must be reversed.

Reversed.

BELL, J., and HURLBUT, J., specially concur.

HURLBUT, J., specially concurring:

I agree with the court in reversal of the judgment, and with its reasoning generally, except that part which holds that the statute quoted, sec. 6579, Revised Statutes, 1908, is applicable in this case to appellee.

The record shows that when appellee first went to work on the building it was in the capacity only of superintending the construction work of the same, and that is the only kind of service he claims to have rendered to the city. I think this character of service is necessarily one requiring skill, experience and special knowledge, and brings the one performing it within the category of engineers, architects, surveyors, attorneys, etc. I am convinced that the legislature, in passing the statute, did

not contemplate as coming within its provisions, as to competitive bidding after advertisement, any person employed by the city to render services calling for special skill, knowledge or experience.

New York, Texas and Virginia, have on this subject statutes somewhat similar to our own. The appellate courts of New York and Texas, and the federal court of Virginia, have all held that the statute does not apply to engineers, superintendents, etc. I fail to find where an appellate court of any state has directly passed upon and construed a statute similar to our own, contrary to the cases mentioned: *City of Newport News v. Potter*, 122 Fed., 321, 58 C. C. A., 483; *City of Houston v. Glover*, 40 Tex. Civ. App., 177, 89 S. W., 425; *City of Houston v. Potter*, 41 Tex. Civ. App., 381, 91 S. W., 389; *Horgan & Slattery v. City of New York*, 114 App. Div. 555, 100 N. Y. Supp., 68.

BELL, J., specially concurring:

I concur in the conclusion of my associates, that the judgment of the trial court shall be reversed, but prefer to base my concurrence on errors committed by the trial court in giving instruction number 2, which directs a verdict for the appellee not authorized by the law or the evidence. By this instruction the jury were directed that they must find for the appellee in a sum of at least \$5.00 per day for at least 293 days, and that they should add to the amount so found interest thereon at 8 per cent per annum from April 20th, 1903, to the time the case was submitted.

I do not think that the evidence was of that direct and conclusive character, which justified the court in taking from the jury the privilege of determining the minimum time that the appellee worked for the appellant, or the minimum value which he should receive for his services; and the direction of the court that the jury add interest to the sum found due was without authority of

law. The verdict shows \$753.12 in excess of the highest amount that the appellee claimed for his services, which excessive amount must be attributed to an allowance of unlawful interest.

It may be truly said that counsel interposed no objection to the giving of instruction two directing the jury to add interest at 8 per cent per annum from the time the work was completed to the time of the submission of the cause to the jury; nor did counsel object to this item in his brief or argument. It may be admitted that, if this were a suit against a private individual, who might contract to pay interest on an open account, such an omission on the part of his counsel might bind him by acquiescence; but a city cannot in any manner legally pay interest upon such an account, and it is difficult to see how counsel, by omitting to object, can commit his principal, the city, to the payment of this large unlawful item when the city, itself, could not, by the most solemn affirmative action, bind itself to such a payment. Here is a question of the lack of power on the part of the city to pay such interest at all. The United States, towns, cities, counties, states and other similar corporations are not obliged to pay interest, and have no right to pay it, unless there are statutes which compel them to do so.—Perley, *Law of Interest*, 65; *Montezuma Co. v. Wheeler*, 39 Colo., 207-215, 89 Pac., 50.

It is also an elemental principle that sovereign is not bound by the words of a statute unless it is expressly named, and the cities and counties of a state, being but agents or instrumentalities thereof, are governed by the same rules as the state.—1 Dillon, *Municipal Corporations*, 23; *Soper v. Henry Co.*, 26 Iowa, 264; *Montezuma Co. v. Wheeler*, *supra*, 214.

There is no statute compelling or permitting cities of this state to pay interest on any unsettled accounts or other ordinary indebtedness until the same are reduced

to warrants or certificates of indebtedness and presented to the treasurer for payment, etc., as provided in sec. 3610, Mills' Ann. Statutes, Revised (1912).

It is my opinion that the legislature did not intend, by the enactment of sec. 6579, Revised Statutes of 1908, that a municipality should advertise for and receive bids for such technical, professional or incidental assistance as it may deem wise to employ in guarding the interest of the city against the neglect of contractors in the performance of their undertakings.

[No. 3816.]

GOERKE V. THE TOWN OF MANITOU, ET AL.

1. **EJECTMENT—Evidence.** Plaintiff relies upon his own title, and must establish it by proof.
2. **PUBLIC ROADS—Proceedings of County Commissioners to Establish—Record.** County commissioners in establishing public roads exercise judicial functions and are regarded as courts of special and limited jurisdiction.

Whoever relies upon their proceedings as an estoppel or adjudication must show their jurisdiction, both as to the subject matter, and as to the persons whose lands were sought to be appropriated, and must show also the identity of the road.

The proceedings being had under Rev. Stat., 1868, c. 76, and the record failing to show a petition by ten free-holders, the termini of the road, a day appointed for hearing the petition, notice served upon the land owners, that any hearing was had, that the viewers appointed were free-holders, or that the day appointed for their meeting was announced, and there being no evidence to supplement these defects, *held* jurisdiction was not shown.

3. — *Notice of Meeting or Viewers.* It appearing that the day fixed for the meeting of the viewers was less than ten days subsequent to their appointment, *held* that the board failed to acquire jurisdiction either as to subject matter or person.
4. — *User.* The evidence held to establish a public road by user for the width actually traveled and used.

5. — *Width of Road by User.* The provisions of General Stat. 1883, sec. 2953, sec. 3928, Mills' Stat., are not effective to extend a public road established by a mere user, beyond the width actually traveled, nor to apply to such a highway the provisions of Rev. Stat., sec. 5849.

The width of a road so acquired is not to be extended by reference to a void record as color of title.

6. EVIDENCE—*Presumptions—Burden of Proof.* Whoever relies upon the order of a tribunal of specially limited jurisdiction has the burden of establishing the jurisdiction. Save as it appears from the record no presumption attends the proceedings of such tribunals.

Appeal from El Paso District Court. HON. J. W. SHEAFOR, Judge.

Mr. BENJAMIN GRIFFITH, Mr. ARCHIBALD A. LEE, Mr. J. F. SANFORD, for appellants.

Mr. ROBERT S. ELLISON, Mr. C. W. DOLPH, Messrs. VANATTA & DOLPH, for appellee.

KING, J., delivered the opinion of the court.

This action was brought by the town of Manitou, a municipal corporation, in ejectment to oust the defendants from and to obtain possession of real estate described in the petition as "the east two-thirds of the famous scenic rock commonly known as the "Balanced Rock," and the west half of the famous scenic rock commonly known as the "Steamboat Rock," and a strip of land adjoining the last named rock upon which is situated a one-story frame building, all of which was alleged to be within the boundary lines of, and a part of, a certain public street of the plaintiff commonly known as the Garden of the Gods road, alleged to be sixty feet wide, thirty feet of which lay on each side of the center line of the said street, to which plaintiff claimed title in fee simple, and all of which was in the possession of the defendants, who are alleged to wrongfully and unlawfully withhold the same. All the allegations of the complaint, except defendants' possession, were put in issue by the answer,

in addition to which affirmative allegations were made, in the nature of new matter, assigning equitable reasons why the plaintiff should be estopped from claiming possession of the roadway, or of the rocks, or of improvements placed upon said premises by the defendants, or their grantors. Defendants prayed for affirmative relief.

Upon verdict of a jury, the decree of the court was rendered in favor of the plaintiff, adjudging that it was the owner in fee of all the said premises described as heretofore, and entitled to possession thereof.

The court submitted the case to the jury upon instructions which required them to find for the plaintiff if they found from the evidence, either that the road had been established by the board of county commissioners, substantially in compliance with the law at that time in force, or if they found that the road had been used as such by the public uninterruptedly for a period of twenty years or more, and that if under either theory they should determine that a road had been established, such roadway must be held to be sixty feet in width, thirty feet on each side of the center line; and if the premises described in the complaint were within this sixty-foot strip, the plaintiff would be entitled to a verdict. In so instructing the jury, we think the court erred, for reasons which we shall state hereafter.

1. Plaintiff attempted to show that the roadway in dispute was laid out by valid action of the board of county commissioners, and also to show a road by user, and in so doing introduced certain records of the board of county commissioners pertaining to a road through the Garden of the Gods. These records were first identified by Irving Howbert, who was the county clerk, and clerk of the board of county commissioners at the time the proceedings of the board of county commissioners were had. The petition for the road was not offered. The records offered and received were from the minutes of

the board, as follows: (1) An order of the county commissioners dated June 12, 1873, reciting that:

“The petition of Young, Wilson, Gatchell and others, asking that a county road be laid out, running from a point on the county road in Section 27, Town. 13, Range 67, through the Garden of the Gods to a point on the county road near Von Hagen’s west line, was then read. The commissioners present having examined said proposed road, and having received assurance from the parties interested that they would open said road at their own expense, and would pay all damages that might be assessed by reason of the location thereof, and all expenses of viewing, surveying and locating said road, therefore it was decided by the board to appoint viewers to locate said road. And on motion it was ordered that Henry Burr, F. E. Roberts and John Wolfe be and are hereby appointed viewers to view and locate the road prayed for by Young, Wilson, Gatchell and others, and to assess any damages that may accrue to the owner of any lands over which said road may pass; and June 21st, 1873, be set apart as the day of their meeting for such purpose, and that said viewers report to the Board at the next meeting.”

(2) An order made June 28, 1873, reciting that the board then heard the report of the viewers appointed at the last meeting to view and locate the county road as prayed for by Young, Wilson and others, the report being as follows:

“To the Honorable Board of County Commissioners of El Paso County, Colorado: The undersigned viewers appointed to view the road from near Manitou through the Garden of the Gods to Camp Creek, would report that they have completed their duty and located the road as laid down on the accompanying plat, and find that the property through which it runs is benefited more than

it is injured, and therefore do not find any damages due to anyone by reason of the location of said road."

(3) An order of the board in the following language:

"On motion the said report was received, and it was ordered that said report, and the plat accompanying the same, be placed on file. Thereupon the Board ordered that the road running from near Manitou through the Garden of the Gods to Camp Creek, as located and platted by the viewers aforesaid, be and the same is hereby declared a county road."

The plat could not be found, and neither Howbert nor the county clerk at the time of the hearing could give any account of it.

From this statement it will be observed that there was nothing in the records from which the road attempted to be laid out could be identified, neither termini nor general course being given. Nor does it appear that the road located was the road petitioned for. There is no similarity in the description except for the words "through the Garden of the Gods." Therefore, plaintiff was compelled to attempt to identify the road which the county commissioners had tried to lay out with the road in litigation, by evidence *aliunde* the record. We think it failed. Mr. Howbert, Henry McAllister and others who resided in the county in 1873 and subsequently, testified that a roadway which the county commissioners took over (presumably by the order quoted) was then being built and was later completed, so far as it was completed at all, by a private company; that it ran between Balanced Rock and Steamboat Rock, and from thence to or in the direction of the inhabited portion of the town of Manitou, at that time unincorporated. There the identification ended. But neither at that time nor at the time of the trial was any platted portion of said town or addition thereto nearer than a quarter of a mile of said rocks,

and there is nothing to show that the town of Manitou had platted said road as a street, or adopted it as a street, or recognized it as such, except by doing some work thereon from time to time, as also did the county and private individuals. The land of the defendants was included within the corporate limits of the town of Manitou when incorporated in 1876, and we assume that after that time the town, for the public, had all such rights therein as the county had acquired.

If the proof made is sufficient to show a road established by the act of the county commissioners in 1873, and to identify it as the road involved herein, it might be held, in the absence of an order of the board of county commissioners, fixing a different width, that the road so laid out was sixty feet in width, which would seriously complicate matters with respect to the rights of the parties to the possession of the scenic rocks, which are in fact the subject of the controversy, however that fact may be veiled. The action is in ejectment, and the plaintiff must rely upon the strength of its own title, and must establish it by sufficient proof. In doing this it had to rely, and did rely, upon certain proceedings of the board of county commissioners while acting in a judicial capacity.

Boards of county commissioners when engaged in hearing matters respecting the opening of roads and streets, and assessing benefits and damages, are exercising judicial functions, and are regarded as courts of special and limited jurisdiction.—Elliott on Roads & Streets (2d Ed.), secs. 272, 284; *Doctor v. Hartman*, 74 Ind., 221; *Stone v. Augusta*, 46 Me., 127; *Chicago, etc., Co. v. Chamberlain*, 84 Ill., 333; *Northern P. T. Co. v. Portland*, 14 Or., 24, 13 Pac., 705. And the weight of authority is that the jurisdiction of such tribunals must appear on the face of the record, both as to jurisdiction of the subject-matter and of the persons of those whose

land is sought to be appropriated.—*People v. Brown*, 23 Colo., 425, 48 Pac., 661; *State v. Hemsley*, 59 N. J. Law, 149, 35 Atl., 795; Elliott on Roads & Streets, sec. 285.

There is a diversity of opinion as to whether plaintiff, in relying upon a road by statutory proceedings, must prove the jurisdiction of the board, or whether, upon a showing of an order locating and declaring a road open, the burden of showing that jurisdiction was not obtained is upon the person asserting the invalidity of the judgment. But it is our opinion that in this state the burden of showing jurisdiction is, and ought to be, on the plaintiff. In *People v. Brown*, *supra*, it is said:

“The board of county commissioners has but a limited and special jurisdiction, and as there is no presumption in favor of the regularity of its proceedings, its records must *affirmatively* show the necessary jurisdictional facts in support of its action.” (Italics ours.)

And the ruling of the court of appeals in *Thatcher v. Crisman*, 6 Colo. App., 49, 39 Pac., 887, was to the same effect as to the necessity of an affirmative showing that the board obtained jurisdiction, or the presumption of validity would not be indulged. A strong statement of the same rule is found in *Oliphant v. Commissioners of Atchison County*, 18 Kansas, 386, 398, in an opinion by Mr. Justice Brewer, in which it was said:

“There is no presumption, in favor of tribunals of limited and special jurisdiction, of the existence of facts outside of those named in the record. A party asserting their existence must prove them, or the case will stand as though they did not exist.”

Further along in this opinion the court said:

“This record fails to show that the petitioners were householders. *Prima facie* it shows that the county board had no jurisdiction, and that the proceedings were void. There is no finding that the petitioners were householders, none that a sufficient petition was presented, and no facts

stated anywhere in the findings from which it can be inferred that a sufficient petition existed.”

By the decision of our supreme court in *McLaughlin v. Reichenbach*, 52 Colo., 437, 122 Pac., 47, and since that time by repeated decisions of this court, it has been held that where a judgment is relied on as an estoppel or as an adjudication, it must be accompanied by the judgment roll, in order to show that the court had jurisdiction both of the subject-matter and of the persons, and to identify the subject-matter as the same as that in litigation, and if the judgment roll as so offered fails to show jurisdiction of either subject-matter or person, or identity, there is a failure of proof; and if the judgment roll shows affirmatively a lack of jurisdiction, the judgment must be held void.—*Fleming v. Howell*, 22 Colo. App., 382, 125 Pac., 551; *Terry v. Gibson*, 23 Colo. App., 273, 128 Pac., 1127; *Empire R. & C. Co. v. Gibson*, 23 Colo. App., 344, 346, 129 Pac., 520; *Empire R. & C. Co. v. Coleman*, 23 Colo. App., 351, 353, 129 Pac., 522; *Empire R. & C. Co. v. Battelle*, 24 Colo. App., 375, 133 Pac., 1123; *Empire R. & C. Co. v. Patterson*, 24 Colo. App., 395, 122 Pac., 1125; *Empire R. & C. Co. v. Lumelius*, 24 Colo. App., 49, 131 Pac., 796, 797. If we follow the rule laid down in those cases, we must of necessity hold that the plaintiff in this case was required to show affirmatively the jurisdiction of the board of county commissioners, both of the subject-matter and the persons of the owners of the land, and the identity of the road; that if it failed in either, there was a failure of proof fatal to its cause of action based on that judgment, for undoubtedly it introduced the record of the board as an estoppel against the defendants, and as an adjudication of the ownership of the very rocks in controversy. There was a failure to prove jurisdiction of either the particular subject-matter or persons, by the record or otherwise, and an affirmative showing

by the record that jurisdiction of the persons of the land owners or holders was not obtained.

The validity of the proceedings of the board must be determined by the laws of 1868, Rev. Stats. 1868, page 564, section 6, which provides that when a petition shall be presented to the board of county commissioners of any county, praying for a public road to be laid out, signed by not less than ten of the householders of the county, designating the *termini* and general course of the road, and depositing the expenses of viewing the road, the board shall appoint a day for the hearing of the petition, and direct that some of the petitioners serve written notice upon every person residing upon any of the land across which it is proposed to lay the road, giving the substance of the petition, and the time assigned for the hearing, and that the clerk post like notice upon the door of his office, not less than ten days before the date of hearing; that upon the day set for the hearing, if the notices have been given, the service and posting of which is to be proven by affidavit of the person serving or posting the same, the commissioners shall proceed to hear the petition and any objections, and thereupon, if deemed necessary and expedient to locate the road, they shall appoint three disinterested householders as viewers to view and locate the road, make a survey and plat, determine the expense of opening the road, and assess and fix the damages and benefits to the owner of lands over which the road shall be located, and the commissioners at the time of the appointment of such viewers must fix and publicly announce the day and place for the meeting of such viewers not less than ten days subsequent to the day of such appointment.

It may be presumed that some kind of a petition was filed, because the order of the board recites that a petition was filed; but that order failing to show, and being the only evidence of what was in the petition, the record

fails to show (and there is no evidence to supplement it) the following matters required by the statute:

(a) That the petition was signed by ten householders of the county;

(b) the *termini* and general course of the road;

(c) that the board, upon the receipt of the petition, appointed a day for hearing the petition;

(d) that the board directed written notice to be served upon the land owners, or that any such notice was served:

(e) that the clerk posted like notice upon the door of his office for not less than ten days, or for any time;

(f) that there ever was such a hearing;

(g) that the viewers appointed were householders, or disinterested;

(h) that the day fixed for the meeting of the viewers was publicly announced.

The record also affirmatively shows that the day fixed for meeting of the viewers was less than ten days subsequent to the day of such appointment, and therefore the notice required to be given neither was given nor could have been given; therefore we think there is not only a failure to show jurisdiction, but an affirmative showing in some respects that the board failed to acquire jurisdiction either of the subject-matter or of the persons.

The final order establishing the road must be held to be insufficient for that purpose.—*Missouri Pac. Ry. Co. v. Atkinson*, 23 Colo. App., 357, 129 Pac., 560; *Cox v. Commissioners*, 194 Ill., 355, 62 N. E., 791.

2. The evidence conclusively shows that a roadway was laid out in the summer of 1873 by a private company called the Colorado Springs Company of Manitou, which connected the town of Manitou with the Balanced Rock and other country beyond; that the road was built and finished so it could be traveled in June and July, or later during that summer; United States patent was

issued to the defendants' grantor July 25, 1873, and it may be assumed that the land was in the possession of the patentee for a considerable period of time prior to that date, otherwise the patent could not have issued; this road was continuously used by the public from that time without objection shown until about 1892, or subsequently; that at all times the road passed between the Balanced Rock and Steamboat Rock; at first it was there very narrow and dangerous; one of the defendants went into possession of the land in 1890, and in 1892 one of them obtained a lease from the owner, a resident of Holland, under contract to occupy it and improve the roadway between the two rocks, and from that time to the time of the suit this land was occupied by the defendants, first as tenants, afterwards under contract of purchase, and later as owners of the fee; no change was made in the travel on the roadway at this immediate place except such as was made by the defendants in improving the road in the vicinity of and between the rocks for purposes of gain, and it must be held that a road by user for the prescriptive period, and for the width used, has been established.

Appellee contends that this prescriptive roadway must be held to be sixty feet in width (1) because that was the width fixed by statute in 1868 for all public roads unless otherwise ordered by the commissioners, and (2) that subsequent acts have declared that all roads (except private roads), either established regularly by the commissioners or recognized by them, or used for the prescriptive period, are public roads, and that all public roads, unless otherwise ordered, are sixty feet in width; section 2953 Gen. Laws of 1883, section 3928, Mills' Ann. Stats., being particularly relied on. It reads as follows:

“All roads and highways except private roads, heretofore established in pursuance of any law of this state or the Territory of Colorado, and roads dedicated to

public use that have not been vacated or abandoned and such other roads as are now recognized and maintained by the corporate authorities of any county in this state, are hereby declared to be public highways:''

The appellee further contends that even if the order establishing the road was invalid, nevertheless it operated as color of title, and therefore the road for its entire width of sixty feet must be held to exist, whether by color of title or by prescription. The act of 1883 does not, nor does any other like act, specifically express a purpose of curing any invalid action or records (*Thatcher v. Crisman*, 6 Colo. App., 49); nor, taken in connection with the statute fixing sixty feet as the width of public roads, can it be held to be effective to extend the width of the road in controversy beyond that established by adverse user; that is to say, the width actually used; for, in the first place, the statute does not purport to make valid what was theretofore invalid, and if its purpose was to increase the width of the prescriptive road, and take other lands of the owner, without compensation, it would be unconstitutional; and, further, being a part of an act concerning roads, which has no reference to city streets, it should not be held applicable to the present road within the corporate limits. The title to the entire width cannot be established by color of title furnished by the record, for there was no description by which a road of any dimensions can be identified; there was no paper title upon which color can be predicated.

3. Our conclusion is that a road, the width of which is not uniform, but necessarily restricted by the barriers consisting of the rocks mentioned, has been established by user. The evidence introduced shows beyond controversy that, conceding to the plaintiff the ownership of the roadway established by user, no portion of the Balanced Rock or of the Steamboat Rock, or of the house mentioned in the pleadings, is within the roadway, all of

which, however, would be found within the roadway if given a width of sixty feet.

Everything tends to show that the effort of the plaintiff was not to obtain possession and control of these two valuable scenic rocks for road purposes, for they have never been used for road purposes, and could not be so used without destroying their scenic value, and destroying the most valuable asset connected with the defendant's lands. If the city wishes to obtain this property for park purposes, it should proceed to condemn it.

The evidence strongly tends to show that defendants, in denying to the plaintiff and to the public the free use of the limited roadway, through misconception of their rights, or through greed for gain, caused so much trouble to the traveling public and to the city as to bring about this suit. Some of their acts were probably reprehensible, but this cannot justify the court in depriving them of their property rights. Beginning with 1892, before the lapse of twenty years after the road was first used, they commenced, and have continuously pursued, a policy of improving this land; they have done extensive rock work upon the road, built a pavilion adjacent to Steamboat Rock at an expense of \$3,000, built upon it an observatory for the use of the traveling public, built a pavilion at the southern extremity of their lands for the use of inter-urban passengers who wish to visit these scenic wonders, and all together have expended many thousands of dollars in cash and labor, the value of which would be almost entirely taken from them if the city should prevail. No objection was made by the city from 1892 to 1910, at or about the time the suit was begun, either to the occupation of these rocks or their improvement by the defendants. While there is a diversity in the authorities as to the presumption that should prevail as to the action of the board of county commissioners or of any other court, whether of general or of limited jurisdiction, after a

lapse of many years, we are fully persuaded that no doubtful presumptions should be indulged in for the purpose of holding this road valid under the proceedings of the board of county commissioners, of the full width of sixty feet, to the end that the city may despoil the defendants. Even after indulging all presumptions, we might still hold that the city's rights would not extend to the control of these rocks, being limited to necessary use for road purposes, or we might hold that the city was equitably estopped; but those questions present greater difficulties than we find in coming to the conclusion either that the action of the board of county commissioners was void, and therefore no rights attached, or that the proof of the jurisdiction of the board was insufficient, and therefore the road can only be sustained by user, and limited to the width actually used, which could not have been extended to take in these rocks without destroying them.

The judgment is also erroneous in declaring that plaintiff was the owner of this property or any of it by unqualified fee. Whatever title it may be awarded should be qualified as held by the court in *Lithgow v. Pearson*, ante 70, 135 Pac., 759.

The defendants asked for affirmative relief against any other or further action based upon the alleged street. We think, under the pleadings, full settlement of the cause of litigation may and should be made. The judgment is reversed and the cause remanded, with instructions to render judgment in favor of the defendants for the premises described in the complaint, and in favor of the plaintiff, adjudging that it is the owner of a qualified fee to the easement, and entitled to the possession of a roadway or street, between Balanced Rock and Steamboat Rock, not to exceed the width of the roadway as it existed at the time of the commencement of this

suit, and in no event to include either of the rocks in question; and that appellants recover their costs.

Reversed and Remanded.

[No. 3832.]

BONFILS V. GILLESPIE.

1. EVIDENCE—*Admissions in Pleading.* In an action upon the judgment of the court of another state, the admission that such court is a court of record, the service of process, and appearance, and the non-payment of the judgment disposes of all questions as to the existence of the judgment unsatisfied, and the jurisdiction of the court, both as to the person and subject matter.

2. FOREIGN LAW—*Presumptions.* There is no presumption of law that the statutes of another state regulating the practice of the courts are identical with those of this state.

3. EVIDENCE—*Judicial Notice—Decisions of Other States.* In an action upon a judgment rendered in another state the court will invoke the decisions of the court of final resort of that state as to the rules of pleading which there obtain.

4. CONSTITUTIONAL LAW—*Judgment of Another State.* The judgment of a court of another state, having jurisdiction, is conclusive upon the merits. The defendant will not be heard to deny its obligation, nor to impeach it for fraud in obtaining it, save in cases where the court in which the judgment was given, would, itself, allow the defense, in an action upon the judgment.

Appeal from Denver District Court. HON. HARRY C. RIDDLE, Judge.

Mr. JOHN T. BOTTOM for appellant.

Mr. T. F. WATTERS and Mr. PERCY S. MORRIS for appellee.

BELL, J.

In May, 1909, J. M. Burnell, assignor of appellee herein, recovered judgment in the district court of Es-

meralda County, Nevada, against appellant for \$750.00 and costs of suit. Subsequently, Burnell assigned the judgment to said appellee, who afterward brought suit on it against appellant in the district court of Denver, Colorado, and recovered a judgment therein in his favor in the sum of \$1,022.05, from which last named judgment appeal was taken.

In the proceedings in Nevada, appellant was duly served with process, and retained Mullins & Byrne, Esq's, as his attorneys, who appeared for him, obtained a stipulation in writing from plaintiff's attorneys for additional time in which to plead, and subsequently filed an answer to the complaint, and the record of the court shows that, something like fifteen months afterward, the case was set for trial, and later tried without the presence of appellant or his attorneys.

In his amended answer filed to the complaint in the Denver district court, appellant admits the suit and judgment in Nevada; that said judgment has not been satisfied in whole or part; that the court in which it was rendered is a court of record; but denies the jurisdiction of said court, and that the judgment was legally assigned, and alleges, on information and belief, that the trial resulting in said judgment was had without notice to him or his attorneys, and that the plaintiff therein and his attorneys knew when said judgment was obtained that he, the appellant, was not indebted as claimed by them. At the trial in the Denver district court, appellee introduced in evidence the record of the original action properly certified and authenticated, showing that the court there had jurisdiction of the person of the appellant, and of the subject matter, and that a trial was had and judgment rendered in favor of the assignor of the appellee for \$750.00 with costs, and that the same remains unpaid, not appealed from, and in full force and effect. Appellant admits the service, appearance, non-

payment of the judgment, and that the trial court in Nevada was a court of record. This effectually disposes of the questions of jurisdiction as to the person and subject matter, and of the existence of the judgment unsatisfied in the Nevada court.—2 Black on Judgments, 2nd ed., sec. 875.

Appellant contends that his answer in the original action contained, in effect, a set-off, which is new matter, and that no replication was filed thereto. On the strength of this, his counsel, assuming that the code and statutes of Nevada are similar to those of Colorado, argues that the claim of set-off was not controverted, and infers that the same is therefore admitted. There does not seem to be any such presumption of law as counsel assumes.—*Loveland v. Kearney*, 14 Colo. App., 468, 469, 60 Pac., 584; *Sullivan v. Bank*, 18 Colo. App., 99, 103, 104, 70 Pac., 162; *Wolf v. Burke*, 18 Colo., 264, 268, 32 Pac., 427, 19 L. R. A., 792; *Wells v. Schuster-Hax National Bank*, 23 Colo., 534, 536, 537, 48 Pac., 809; *Baxter v. Beckwith*, ante 322, 137 Pac., 901.

Under the conditions of the record before us, we have the right to invoke the aid of the decisions of the highest court of the state of Nevada, and, from those, it seems that new matter is presumed to be denied by operation of law, and that the filing of a replication is unnecessary.—*Cahill v. Hirschman*, 6 Nev., 57, 60; *Loveland v. Kearney*, 14 Colo. App., 468, 469, 60 Pac., 584; *Sullivan v. Bank*, 18 Colo. App., 99, 103, 104, 70 Pac., 162; *Wells v. Schuster-Hax National Bank*, 23 Colo., 534, 536, 537, 48 Pac., 809; *Baxter v. Beckwith*, ante 322, 137 Pac., 901.

Counsel insists that the Nevada judgment is only *prima facie* evidence of the debt, and that *nul tiel record* is an inappropriate plea to suits upon foreign judgments, inasmuch as they do not create a merger, and are

only *prima facie* evidence of an indebtedness, and that either debt or assumpsit may be maintained upon them or upon the original indebtedness, and the general issue in such cases is *nil debet* or *non assumpsit*, as the case may be, and puts in issue both the validity of the judgment and of the debt; and counsel cites many authorities in support of this proposition. These authorities are not pertinent to the question here involved, as, since the adoption of Art. IV, sec. 1, of the federal constitution and an act of congress in pursuance thereof approved May 26, 1790 (U. S. Revised Statutes, sec. 905), there has been a well marked distinction recognized between foreign judgments and judgments of sister states. Said section of the federal constitution provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. The act of congress, *supra*, provides that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice or presiding magistrate, as the case may be, that said attestation is in due form. And the said record and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken. After the adoption of said constitutional provision and approval of said act of congress, there was great chaos and diversity of opinion among the courts of the different states as to the intention of the constitutional convention and congress in their several utterances as to

the effect of judgments of sister state courts when sued upon in courts of other states or of the United States. In 1813 those provisions were construed by the supreme court of the United States, and that court held that the constitution contemplated a power in congress to give a conclusive effect to such judgments, the court saying:

“We can perceive no rational interpretation of the act of congress, unless it declare a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision.”—*Mills v. Duryee*, 7 Cranch, 481, 3 L. Ed., 411; 2 Black, *supra*, sec. 856.

In the *Mills-Duryee* case, *supra*, Justice Story, speaking for the court, also said:

“Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered *prima facie* evidence only, this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the constitution contemplated a power in congress to give a conclusive effect to such judgments,” and held that,

“If it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel record*.”

This holding by the court, however, has been confined to the general issue, and was never intended to exclude such plea as a denial of the jurisdiction. The *Mills-Duryee* case is a leading authority for the proposition that a judgment of a sister state is conclusive on the merits; that, for purposes of pleading and evidence, it is entitled to the full dignity of a record; and that the defendant is not at liberty, when sued on the judgment, to deny the indebtedness, which it ascertains and establishes, or to impeach its justice or deny its obligation.—2 Black, *supra*, sec. 856.

Counsel for appellant cites many decisions perti-

ment to suits on foreign judgments, and among them is that of *Hilton v. Guyot*, 159 U. S., 113, 182, 16 Sup. Ct., 139, 40 L. Ed., 95, which was an action brought in the circuit court of the United States, in the southern district of New York, upon a judgment rendered in the republic of France. Hon. Elihu Root filed a masterly brief in the case, and Justice Gray delivered an exhaustive opinion for the supreme court, reviewing the trial had in the circuit court, and, throughout, court and counsel recognized a marked distinction between the effect given to a foreign judgment governed by the comity of states and international law, and the effect given to judgments of sister states controlled by the positive constitutional and congressional provisions aforesaid. Justice Gray, at page 182 (16 Sup. Ct., 150, 40 L. Ed., 95), epitomized the doctrine in the following language:

“The decisions of this court have clearly recognized that judgments of a foreign state are *prima facie* evidence only, and that but for these constitutional and legislative provisions, judgments of a state of the Union, when sued upon in another state, would have no greater effect.”

However, the modern tendency of the decisions, in this country, is toward holding foreign judgments *in personam*, rendered by courts having jurisdiction, to be conclusive on the merits.—2 Black, *supra*, sec. 829, and authorities cited.

There is no sufficient pleading or tender of proof in the record tending to show that the original judgment was obtained by such fraud as would entitle appellant to relief in the Denver district court. In *Hanley v. Donoghue*, 116 U. S., 146, 29 L. Ed., 535, 6 Sup. Ct., 242, the court drew the distinction between foreign judgments and judgments of sister states, and, in connection therewith, on the question of fraud, said:

“Judgments recovered in one state of the Union, when proved in the courts of another, differ from judg-

ments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.”

Under the foregoing rule, the injured party is required to resort to the court that rendered the judgment, except in cases where the original court would itself allow the defense of fraud in an action upon the judgment. —*Wyoming Mfg. Co. v. Mohler* (Pa.), 17 Atl., 31; 2 Black, *supra*, sec. 917.

The general rule, subject to the exception above stated, was expressed in the case of *Wyoming Mfg. Co. v. Mohler*, *supra*, in the following language:

“If the judgment was rendered in West Virginia by fraud or collusion, the court in which it was entered is the proper one to redress the wrong. It is a matter with which we have nothing to do.”

There are other minor questions presented by counsel for appellant, which we have examined, and, from the condition of the record and otherwise, found untenable and insufficient to reverse the judgment; therefore, the judgment is hereby affirmed.

Affirmed.

Decided February 11, A. D. 1914. Rehearing denied April 13, A. D. 1914.

[No. 3907.]

ROWE V. MULVANE.

1. DEED OF TRUST—*Limitation.* Proceedings for the sale of lands under powers contained in a deed of trust are not an action, and are not barred by Rev. Stat., sec. 4061. Otherwise as to an action to foreclose, where an action at law is barred.

So of an equitable action for the appointment of a substitute trustee, to the end that such substitute may proceed under the power.

If such action can be regarded as otherwise than a bill of foreclosure it is within Rev. Stat., secs. 4070, 4071, 4073.

2. LIMITATIONS—*Express Trust*. The rule that the statute of limitations does not run against an express trust ordinarily applies only between the trustee and the beneficiary. It has no application to a bill to foreclose a mortgage, nor to a bill for the appointment of a substitute trustee under a deed of trust.

Error to Prowers District Court. HON. HENRY HUNTER, Judge.

MESSRS. MERRILL & McCARTY for plaintiff in error.

Mr. H. L. LUBERS for defendant in error.

KING, J., delivered the opinion of the court.

March 2, 1910, defendant in error, as plaintiff, filed his complaint, in the nature of a bill in equity, in which the relief prayed for was that an accounting be had to find the amount due upon a certain promissory note, and that the court appoint a substitute trustee with power to perform the duties imposed and exercise the powers and authority conferred by a certain deed of trust, to the end that the said substituted trustee proceed under the terms and provisions of said deed of trust to make sale of the property described therein, in order to make collection in full of the principal and interest of said note, with costs of foreclosure.

The relief prayed for was predicated upon allegations in substance as follows: That some years prior to his death, defendant's husband, her grantor, had executed a promissory note for the principal sum of \$425, payable November 1, 1893, with interest, and, to secure the payment of said indebtedness, executed a certain deed of trust, covering certain lands in Bent county, in which deed The Colorado Loan & Trust Company (a Colorado

corporation), was trustee, and the acting sheriff of Arapahoe county, Colorado, was successor in trust, and the place of sale, in case of foreclosure, was the Tremont street door of the court house in said county of Arapahoe; that the principal of said note had not been paid, nor any interest, since the maturity of said note; that the corporate life of the primary trustee had expired by limitation, whereby it was unable to execute the powers conferred upon it by said deed of trust, and that by an amendment to the constitution of Colorado, whereby the county of Arapahoe was abolished and the City and County of Denver established, the successor in trust named therein was disqualified, and unable to exercise the powers conferred by said deed of trust; that there is no longer a place designated as "the Tremont street door of the court house in the county of Arapahoe, state of Colorado."

As a defense to the foregoing complaint, defendant pleaded, first, that the cause of action mentioned in the complaint did not accrue within six years, and, second, that said cause of action did not accrue within five years, before the commencement of this action. Upon motion of the plaintiff, the court rendered judgment on the pleadings in his favor, by which it was ordered and decreed:

"That Hamilton Armstrong, present acting sheriff of the City and County of Denver, Colorado, is hereby appointed substitute trustee for the purpose of carrying out all of the objects and purposes of said trust, by advertising for sale the property according to the tenor and effect of the authority of said deed of trust conferred on said trustee; and that the sale shall be noticed to take place at the Tremont street door of the court house in the City and County of Denver, Colorado."

I.

The question presented for determination is whether the action brought by plaintiff was barred by the provisions of the two statutes of limitation pleaded, or either of them, it being conceded by the motion for judgment on the pleadings that the action was brought more than six years after the cause of action accrued.

It is settled law in this state that the six years' statute of limitations does not operate as a bar to proceedings for the foreclosure of a deed of trust, when foreclosure is made by advertisement and sale by the trustee named in the deed of trust, without the aid or intervention of a court proceeding; that such proceedings are not an "action" within the provisions of our statute, which reads:

"The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards."—Section 4061, Rev. Stats. 1908; section 4627, Mills' Ann. Stats. 1912.

Holmquist v. Gilbert, 41 Colo., 113, 92 Pac., 232; *Foot v. Burr*, 41 Colo., 192, 92 Pac., 236, 13 L. R. A. (N. S.), 1210.

It is also settled law in this state that if an action or suit is prosecuted to foreclose a mortgage or deed of trust, such action is barred by the said statute of limitations, if an action upon the note or for the collection of the debt secured by said mortgage or deed of trust is barred by said statute.—*McGorney v. Gwillim*, 16 Colo. App., 284, 65 Pac., 346. In the last case cited it is also ruled that when the statute, after the lapse of time, bars an action upon the debt for its collection, it includes all actions seeking to *effectuate that purpose*. In that case it was laid down as a fundamental principle that while a party may avoid the bar of the statute of limitations by adhering strictly to his remedy under the power of sale

in manner and form, as provided by the deed of trust, without the aid of a court proceeding, yet if for any reason he elect to avail himself of the advantages to be derived from an "action" or suit, he must at the same time accept its disadvantages; that he cannot invoke the benefit of a personal action having for its ultimate purpose the collection of the debt, by adding to, correcting, completing or enforcing the provisions of an instrument in writing by which the debt is secured, without at the same time waiving his exemption from the provisions of the statute of limitations pertaining to such actions. This same principle was announced by Chief Justice Hallett in *Longan v. Carpenter*, 1 Colo., 205, 217, and by the supreme court of the United States in *Carpenter v. Longan*, 16 Wall., 271, 21 L. Ed., 313, in which it was said that a promissory note or debt and the instrument by which it is secured are inseparable; that the security accompanies the indebtedness through all hands, and ultimately shares the same fate. See, also, *Denver B. & M. Co. v. McAllister*, 6 Colo., 261, 263. The unavoidable conclusion to be drawn from *McGovney v. Gwillim* is that whenever the deed of trust given as security for a debt has been brought within the jurisdiction of a court by the *cestui que trust* for remedial purposes in order to collect the debt, it becomes at once subject to the law affecting remedies for the collection of the debt itself, to which the security is but an incident. That question is *stare decisis*, and controlling, at least upon this court.

Counsel for defendant in error contends that the decision in *McGovney v. Gwillim*, as interpreted by the supreme court in *Holmquist v. Gilbert*, is not applicable to the facts of this case, because, as counsel says, all that was decided by the court of appeals in that case was that the holder of the note elected to waive the right of sale by the trustee. It is true that the court of appeals, in

its opinion, stated that the holder of the note had elected to waive the right of sale by the trustee, and the supreme court in *Holmquist v. Gilbert*, in referring to the *McGovney* case, and distinguishing it from the case then under consideration, said:

“It is sufficient to say that in the latter case (*McGovney v. Gwillim*) the court holds that in the case before it ‘by the bringing of this suit, the holder of the note and of the indebtedness has elected to waive the right of sale by the trustee,’ and treats the deed of trust as a mortgage. The question involved here was not presented in that case.”

But the waiver of the right of sale by the trustee was not the only, nor the principal, reason for sustaining the plea of the statute of limitations as a bar in the *McGovney* case. It was given as an additional reason for the conclusion already reached. This is made plain by the words of Wilson, Presiding Judge, when he said:

“Besides, in this instance, by the bringing of this suit, the holder of the note and of the indebtedness has elected to waive the right of sale by the trustee, which is the only distinguishing feature between a deed of trust and a mortgage, and thereby to have the instrument treated as a mortgage.”—(P. 287, 65 Pac., 348.)

Neither that court nor the supreme court intimated that such waiver was the only reason for the decision reached; and an examination of the complaint and prayer in the *McGovney* case will show that the sale by the trustee was not waived to any greater extent than in the present case, for, in that case, it was asked that the foreclosure be made by the trustee, or his successor in trust, or the sheriff, and in this case it is asked that the foreclosure be made by a trustee to be appointed and substituted by the court for the trustee, and successor in trust, designated in the deed of trust. The statement

made by Judge Wilson in his opinion, that there was a waiver of sale by the trustee, is inaccurate, unless it be understood to mean that plaintiff had waived a sale by the trustee except by and with the aid and intervention of the court, which brought the proceeding within the bar of the statute when properly pleaded; and such is the purport of the entire opinion, making it clearly applicable to the facts of this case.

It cannot be said that the action here under consideration has not for its purpose and object the collection of the debt. The collection of the debt is the avowed purpose of the relief prayed for, and the express purpose and effect of the decree. The suit is brought upon the theory and allegation that without the aid of the court, the express powers conferred in the deed of trust cannot be executed. Perhaps the case of *McGovney v. Gwillim* can be distinguished from this case by reason of the fact that the action there was for foreclosure, while the action here is primarily for relief, without which the foreclosure as provided by the deed of trust could not proceed, as no power is given by the deed to appoint a substitute trustee without the aid of a court of equity. But, in principle, it is a distinction without difference. Moreover, incidentally at least, foreclosure under the terms of the trust deed was prayed for and decreed. In effect, this is an action to foreclose the trust deed as a mortgage. Our conclusion is opposed to the conclusion reached by the supreme court of California in *Sacramento Bank v. Murphy*, 158 Calif., 390, 115 Pac., 232, and *Travelli v. Bowman*, 150 Calif., 587, 89 Pac., 347. These cases are practically on all fours with the case under consideration. In principle, we think they cannot be distinguished. The trust deed in *Bank v. Murphy* contained a provision that in case of vacancy in the trusteeship, the bank, as *cestui que trust*, could appoint other trustee

or trustees to execute the trust, in which respect that deed differs from the deed here under consideration, but that difference was held not material. Those cases announce the law of the state of California, but are not controlling in this state. Both upon the force of the reasoning in and the direct authority of the *McGovney* case, we regard this question as *stare decisis*, and are satisfied with the conclusion there reached.

II.

If it be conceded that for the purpose of obtaining the appointment of a trustee "to the end" that he may foreclose the deed of trust, and thereby collect the debt, as herein sought, the debt and its security are separable, and that this is not a suit to foreclose, as the trial court seems to have held, and, for that reason, the six years' statute of limitations affecting actions for the collection of debts founded upon contract is not applicable to this action, then it comes within the exception designated in section 4637, Mills' Ann. Stats., Rev. Stats. 1908, section 4071, as one of the "suits over the subject-matter of which a court of equity has peculiar and exclusive jurisdiction, and which subject-matter is not cognizable in the courts of common law," and within, and is barred by, the provisions of sections 4638 and 4639; relative to bills of relief, which sections are construed together.—*Morgan v. King*, 27 Colo., 539, 63 Pac., 416; *Ballard v. Golob*, 34 Colo., 417, 83 Pac., 376; *Empire R. & C. Co. v. Gehr*, 54 Colo., 185, 129 Pac., 828.

Section 4639, commonly known as the equity statute of limitations, reads as follows:

"Bills of relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within five years after the cause thereof shall accrue, and not after."

In the matter of the appointment of a trustee, the plaintiff prays for relief that only a court of equity can give. The complaint is a "bill for relief, in case of a trust not cognizable by the courts of common law." If it be said that in some of its aspects this is a real action, it is answered that in some of its phases it is a personal action. If it proceeds *quasi in rem*, it proceeds *in personam* as well. While its determination will directly or indirectly affect the realty, it no less directly affects the debt and the possibility of its collection. We think our conclusion is not in conflict with *Munson v. Marks*, 52 Colo., 553, 557, 124 Pac., 187, which holds that the foregoing section does not apply to actions to quiet title or remove clouds from title. This action does not "affect realty *only*"—it affects realty also; and involves the question of a trust.

The defendant in error contends that the statute of limitations does not run against an express trust. Ordinarily, that well known rule applies only to actions between the *cestui que trust* and the trustee. That it does not apply to an action to foreclose a deed of trust or to this action is a necessary implication from, if not the direct holding in, *McGovney v. Gwillim*, *supra*.

The judgment is reversed, and cause remanded, with instruction to render judgment upon the pleadings in favor of the defendant.

Reversed.

[No. 3921.]

SCHOOL DISTRICT No. 16, ADAMS COUNTY, v. UNION HIGH
SCHOOL DISTRICT No. 1, ADAMS COUNTY.

1. SCHOOL DISTRICTS—*Legislative Control*. School districts, being public agencies, they and their directors are subject to legislative control, save as the legislative power may be limited by the constitution.

2. **HIGH SCHOOLS—*Pupils from Another District—Liability of District of Pupil's Residence.*** The requirement of the last proviso in sec. 6 of the act of April 23, 1909 (Laws 1909, c. 202), that the tuition fees of a pupil residing in one district, attending high school in another, shall be paid by the district of his residence, is not in violation of the provision for uniformity in sec. 2 of art. IX of the constitution.

3. **CONSTITUTIONAL LAW—*Title of Statute.*** The title of the act of April 23, 1909 (Laws 1909, c. 202), contains but one subject, and its incidents, and is not a violation of sec. 21 of art. V of the constitution.

4. **DISTRICT COURT—*Jurisdiction.*** Sections 6000, 6006, of the Revised Statutes do not confer exclusive jurisdiction upon school district boards, or the superintendent of education, to decide all controversies to which a school district may be party. Under Rev. Stat., sec. 6007, wherever a money judgment is demanded resort must be had to the courts, and the district court may entertain the action.

5. **PLEADING—*Defects of Form.*** In an action by one school district against another under the last proviso to c. 202, Laws 1909, the complaint should aver that the sum demanded was a necessary charge, or facts from which this conclusion may be drawn, should give the name of the pupil, and state that he possessed the necessary qualifications. Failure in this respect is one of mere form, and being assailable by motion will not be deemed fatal on appeal.

6. **APPEALS—*Harmless Error.*** Formal defects in the complaint which might be remedied by motion in the court below will not be held fatal on appeal where it does not appear that the defect could have prejudiced the defendant.

Error to Adams District Court. HON. CHARLES MCCALL, Judge.

Mr. CLAY B. WHITFORD, Mr. HENRY E. MAY for plaintiff in error.

Mr. B. C. HILLIARD, Mr. J. R. ALLPHIN for defendant in error.

KING, J., delivered the opinion of the court.

This is a suit brought October 10, 1910, by the defendant in error, hereinafter called the plaintiff, to recover from the defendant school district a sum of money charged to it by plaintiff as tuition fees for certain pupils,

residents of the defendant school district, who had attended the high school of the plaintiff. The complaint alleged that the plaintiff and the defendant were bodies corporate, in and for the county of Adams; that the plaintiff was conducting a high school, and during all the times mentioned exacted and charged as tuition fees for the admission of pupils from districts outside the boundaries of plaintiff, the sum of \$2.50 per month for each pupil so attending; that certain pupils residing in Adams county, but outside the boundaries of plaintiff, and within the boundaries of the defendant district, had attended the high school of plaintiff; that for such attendance the plaintiff had demanded from defendant district, payment at the rate of \$2.50 per month for each pupil; that payment had been refused. To this complaint a general demurrer was filed, overruled, and judgment rendered for the plaintiff.

The defendant contends (1) that the statute upon which defendant's liability is predicated is unconstitutional; (2) that the district court had not jurisdiction to determine the controversy; (3) that the complaint did not state facts sufficient to constitute a cause of action.

I.

The statute involved is subdivision fifteenth of section 6655, Mills' Ann. Stats. 1912, Sess. Laws 1909, p. 489, the particular portion necessary for consideration being as follows:

“Provided, further, that whenever any pupil outside a high school district desires to attend a high school within the county where such pupil resides, and such pupil shall possess the necessary qualifications for admittance thereto, the necessary tuition fees charged for the attendance of such pupil by said high school shall be paid by

the school district in which such pupil resides not exceeding \$2.50 per month."

This subdivision, in its amended form as quoted, was approved April 23, 1909. It is first asserted that this subdivision and this proviso violates section 2 of article IX of the constitution, which reads:

"The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously. One or more public schools shall be maintained in each school district within the state," etc.

Under this provision of the constitution, it is contended that no charge for tuition, whether made directly or indirectly, is permissible, and that the charge of tuition to the school district is an indirect charge upon the pupil or his parents, and so within the inhibition of the constitution. We think this contention is without merit. The constitutional provision was adopted in 1876. The general assembly of 1877 passed an act to carry into effect such provisions of the constitution, which act has from time to time been amended to keep pace with progressive thought in educational matters and to furnish the high standard of scholarship now required to be provided for by public schools. A public school is defined as a school that derives its support entirely or in part from moneys raised by general state, county or district tax.—G. L. '77, section 2521; sec. 6776, Mills' Ann. Stats.; sec. 6008, Rev. Stats. 1908. A free public school, within the contemplation of the constitution, is one to which any resident of the state, between the ages of six and twenty-one years, shall be admitted, and there be educated gratuitously, that is to say, at public expense, or from the public funds provided for that purpose. By such constitutional provision the school district is made the educa-

tional unit, or smallest state agency, for the accomplishment of its purpose; and, by section 15 of article IX, the control of instruction in the public schools of such district is vested in a board of education to consist of three or more directors. It is possible that the letter of the constitution is complied with when a public school, providing for an elementary or common school education, is maintained for all pupils within the territorial limit of the school district; but under the provisions of the statute which permit the maintenance at public expense of free public high schools, and in view of the fact that such high schools are maintained and established in some districts, and not in others, the constitutional mandate as to *uniformity* is violated in spirit, if not in letter, if some provision be not made by statute whereby pupils possessing the necessary qualifications, but residing in the less favored school districts, are denied the privilege of high school education at public expense. To insure such uniformity and equality of privilege, the statute under consideration provides that a pupil, residing in a district which does not maintain a high school, may attend the high school of any other district; and while such pupil, for the purpose of distribution of the public school funds, must be enumerated in the district in which he resides, a portion of the funds which, upon such enumeration or otherwise, has been raised in his district for the purpose of educating him, shall be by the district board paid to the high school district which in fact furnishes such education; the amount to be so paid being limited to that necessary to pay such tuition, and in any event so as not to exceed \$2.50 per month. Being public agencies, these districts and their boards of directors are subject to such provisions as the general assembly may make when not prohibited by the constitution. It appears that the legislative provision under consideration was enacted for the purpose and has the effect of producing uniformity in

the system of free public schools, and equality of privilege. We fail to see that it contravenes any provision of the constitution.

It is also urged that the bill approved April 23, 1909, violates section 21 of article V of the constitution, in that the subject matter contained in the proviso quoted was not clearly expressed in the title of said act, and that the bill contained more than one subject. The title of the bill is as follows:

“An act to amend subdivision fifteen of section five thousand nine hundred and twenty-five of the Revised Statutes of Colorado for the year 1908, the same being a part of section sixty of chapter one hundred and twenty-four, in relation to schools.”

The title of the act mentions but one subject, and that is the amendment of subdivision fifteen of the section named. The subject of that subdivision, before amendment, was the right of a pupil resident in one district to attend school in another district. No other subject is contained in the subdivision as amended. It is true that additional and different conditions under which a pupil may attend school in another district are contained in the subdivision as amended, including the payment of tuition by the district from which he comes, and that high school districts are specifically mentioned; but the subject matter of the original subdivision is not changed, and only one subject is contained in the bill. The details are but incidental to that subject. A similar provision, differing only in details, was contained in the act of 1877, copied almost literally from the territorial act of 1861.

II.

It is also urged that the district court was without jurisdiction to try the issues made by the complaint. That contention is based upon the school law which pro-

vides that "any person aggrieved by any decision or order of the district board of directors, in matter of law or fact," may appeal therefrom to the county superintendent of the proper county, and from the decision of the county superintendent to the state board of education.—Sections 6768 and 6774, Mills' Ann. Stats. 1912; secs. 6000 and 6006, Rev. Stats. 1908. These sections do not confer upon boards or superintendents *exclusive* jurisdiction to decide *all* controversies between district boards of directors and other persons, natural or corporate, who may be aggrieved by the decision of the district board, although they may, and, we think, do, impliedly confer such jurisdiction over certain classes of cases pertaining to educational matters. This action relates to a statutory liability, of a *quasi* contractual nature, in which the only effectual remedy to the plaintiff must be, and is, in some tribunal having power to render and enforce a money judgment.—*School Dist. v. Hale*, 15 Colo., 367, 25 Pac., 308. Section 6775, Mills' Ann. Stats. (sec. 6007, Rev. Stats. 1908), denies that power to the county superintendents and the state board of education.

III.

The contention is made by plaintiff in error that the complaint does not state facts sufficient to constitute a cause of action because it does not allege that the \$2.50 per month charged for attendance of each pupil was the "necessary tuition fee," and did not allege that the pupils admitted to the high school possessed "the necessary qualifications for admittance thereto." What constitutes a necessary tuition fee is not defined by the statute; that is a matter to be determined by the trial court when properly presented. An amendment made in 1913 seems to contain an interpretation of that statute, in the proviso, that no high school shall be required to admit pupils

from another district at a less charge per month than the average cost per pupil for the previous year for that high school; but that is not the only interpretation of which the language before us is susceptible. We think the complaint should have stated that the charge exacted, which was the maximum under the statute, was a necessary charge, or facts from which said conclusion might be drawn, and also that it should have alleged that the pupils admitted possessed the necessary qualifications, and should have stated the names of the pupils for whose attendance the charge was made. Those are omissions which could readily have been remedied by motion to make more specific, and matters that might have been set up as a defense. The objection is highly technical; it does not appear that the defendant has been or could be prejudiced by the failure of the complaint to make these allegations, and we are not disposed to hold the complaint fatally insufficient, although it is informal and faulty to a degree that ought not to pass without some criticism.

Perceiving no substantial error, the judgment is affirmed.

Affirmed.

[No. 3928.]

GROGAN V. TRAVELERS' INSURANCE COMPANY.

1. CONTRACT—*Elements.* To a valid contract mutual assent is necessary.
2. INSURANCE—*Renewal by Agent Not Accepted by Assured.* As the expiration of a life policy approached, the local agent of the insurer not being able to communicate with the assured, forwarded to the insurer company, from her own funds, the premium required for the renewal of the policy, and transmitted to the assured the renewal

receipt. The assured, later, being informed by the agent of the advance which she had made, wrote expressing his regret at the course taken, declaring that he had not intended to renew, declining to repay the advance, and promising to return the renewal receipt, on his return from a journey upon which he was then absent from home. During this journey he came to his death. The insurer company being informed of the facts, cancelled the policy. *Held* there was no meeting of minds upon the proposed renewal of the policy and that the beneficiary therein was not entitled to an action.

Error to the Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Messrs. TONEY & TONEY, Mr. GEORGE S. REDD, and Mr. BERT MARTIN for plaintiff in error.

Messrs. GOUDY & TWITCHELL and Mr. J. H. BURKHARDT for defendant in error.

BELL, J.

In September, 1907, The Travelers' Insurance Company of Hartford, Connecticut, issued to William Grogan, the assured, an accident insurance policy in the sum of \$3,000.00, payable to Alice S. Grogan, plaintiff in error, beneficiary named therein, for an annual premium rate of \$25.50. The policy, by its terms, expired at noon of September 6, 1908, and provided for the payment of certain accumulating benefits and double indemnity in specified cases, and, upon its expiration September 6, 1908, it was renewed for another year ending September 6, 1909. The assured was engaged as state foreman of The Colorado Telephone Company during the existence of the policy, and, much of the time, was away from his home and office. Before the expiration of the renewed term of the policy, Ella J. Colburn, acting as soliciting agent of the insurance company, called at the assured's office from time to time for the purpose of delivering to him, if he would accept, a renewal receipt which would continue the

policy in force for another year ending September 6, 1910. She was unable to find him at the office, however, and, about a week before the first renewed term had expired, she enclosed, in a letter addressed and mailed to the assured, the renewal receipt for the year ending September 6, 1910, which was furnished her by the insurance company, duly signed and attested. By custom or arrangement with the company, the agent was allowed sixty days from the expiration of the policy, or last renewal, to make remittances for the succeeding renewal, or return the renewal receipts, and, not having seen or heard from the assured during this period, in her endeavor to continue the policy in force for another year, the agent advanced the amount of the premium to the company on November 9, 1909, and, on the same day, addressed and mailed a letter to the assured informing him of the fact and requesting that he mail a check to her in settlement thereof. The assured seems to have been out on the road, and wrote his reply on the letter he received, informing her that he had been out of the city almost continually of late, and, therefore, he could not attend to the matter; but that, "if you have advanced the amount of the premium," he was very sorry, as he had about decided to discontinue the policy. Through adopting the subjunctive form of speech, the assured implied a doubt as to the actual payment of the premium; nevertheless, he did not positively repudiate her alleged unauthorized conduct, neither did he express his approbation of her alleged voluntary services in his behalf. On November 26, 1909, she again wrote the assured, informing him that the policy was in full effect, and protection to him was continued, and would be as long as he held the receipt; and, continuing, further informed him as follows:

"As I had not heard from you to the contrary, although I had written you and had tried several times to see you, I thought, of course, that you wished the protec-

tion continued, as you had carried it for several years. I, therefore, advanced the premium out of my own personal funds. I do not want to urge you to keep this insurance if you do not feel that you want it, so if you decide that you do not wish the protection continued, kindly return me Renewal Receipt No. 1117347, and mail me your check for \$6.40, amount due on your policy since September 6th, date of expiration of your last premium payment. I will then return the receipt to the company and will cancel the policy on December 6th and amount of unearned premium will then be returned to me. If you do not return the receipt, I will consider that you wish the protection continued and will then be looking for your check for \$25.50, the full year's premium. I trust that the latter will be the case and that I may be favored with the continuance of your patronage.

"I learned from your office this morning that you had left on another trip, but that they expected you to return next Tuesday, the 30th. I trust that you will give this matter your attention immediately upon your return."

On December 9, 1909, he replied to the letter above quoted, as follows:

"I did not have time to answer your letter while I was in Denver. I am truly sorry I have been of so much trouble to you. I will return the renewal receipt No. 1117347 just as soon as I return to Denver, which will be about December 18th or 19th. I am very sorry you advanced the amount of the policy, as I did not intend to renew it this year, therefore I am not sending the \$6.40 which you say is due for three months. I cannot see where I can be held for this amount, and sincerely hope the company will not hold you for it."

Whatever may be said of what had passed between the parties previously, there seems to be no question but the contents of the letter last above quoted operated as a

polite and unmistakable repudiation of all of the voluntary acts of the soliciting agent in her endeavor to continue the life of the policy, and positively notified her that he did not intend to renew the policy in whole or part. The evidence clearly establishes that the soliciting agent voluntarily paid the renewal premium of \$25.50 necessary to continue the policy in force to September 6, 1910, under the misapprehension that the assured desired the continued protection and, on demand, would repay her for the advance so made; and she, in effect, so wrote him. However, instead of desiring or intending to renew the policy, he notified her to the contrary; and, when notified that the premium had been advanced to the company, instead of remitting the amount thereof, he politely informed her that he could not be held for its payment in whole or part, and promised to return the renewal receipt upon his arrival in Denver. There were no further transactions or correspondence between the assured and the agent, and, on December 18th, 1909, he was killed in a railroad wreck near Crested Buttes, about three or four hundred miles from his home. The superintendent of construction of the telephone company informed the agent of the death of the assured, and inquired as to the condition of his insurance. She frankly told him how the matter stood, and he assured her that the relatives of the assured would reimburse her for the amount of the premium advanced. She thought, however, and he agreed, that it was her duty to submit the correspondence between her and the assured to her superior officers, which was accordingly done, and thus, for the first time, they were made acquainted with the facts in the case. They returned to the agent the amount of the premium advanced by her, and cancelled the policy, as it was a practice of the company to refund the premium in a disputed case, where it was manifest that no contract existed between it and the assured.

It is clear that there was no meeting of the minds of the company, or any of its agents, with that of the assured in the same sense, or at all, at any time, for a renewal of the policy beyond September 6, 1909, hence there was, and could be, no contract existing between him and the company, or any of its agents, for a renewal or extension of the policy beyond said date. Under the circumstances presented in the record, we know no legal principle that would bind the assured for the payment of the premium and the acceptance of a renewal of the policy, which he never desired, intended to accept, or authorized anyone to procure for him; and, if he had lived, and could not have been required to pay the premium advanced by the soliciting agent, or if, instead of death, he had suffered a mere disability covered by the policy, and could not have recovered therefor, then it is difficult to see upon what ground his beneficiary can recover, after his death, upon a repudiated policy, for which he paid nothing, and positively refused to pay for or accept. If we assume that assured received the letters of the soliciting agent and the renewal receipt in due course of mail, and held them in silence until after he was notified that the agent of the company had advanced the premium, and attempted to renew the policy, his mere possession of the renewal receipt and proposition for renewal would not imply an assent to accept the same, but, rather, would be taken as a declination thereof. —*Ins. Co. v. Johnson*, 23 Pa., 72, 75; *Brink v. Merchants', Etc., Co.*, 17 S. D., 235, 237, 95 N. W., 929; *Busher v. N. Y. L. Ins. Co.*, 72 N. H., 551, 58 Atl., 41; *Whiting v. Mass. Ins. Co.*, 129 Mass., 240, 37 Am. Rep., 317; *Van Wert v. St. Paul F. & M. Ins. Co.*, 90 Hun, 465, 36 N. Y. Supp., 54; *N. Y. L. Ins. Co. v. Manning*, 156 App. Div., 818, 124 N. Y. Supp., 776, 142 N. Y. Supp., 1132.

If insurance agents entertain the mistaken view that a policy is in force while the written proposition therefor

is in the possession of the assured named in the policy, without his assent to the essential elements of the contract, this would not change the rule of law that there cannot be a legal contract without the mutual assent of the parties thereto.—*Richmond v. Travelers' Ins. Co.*, 123 Tenn., 307, 130 S. W., 790, 30 L. R. A. (N. S.), 954.

The payment of the premium in this case, made by the agent, through the mistaken apprehension that the assured desired a renewal of his policy, and that he would, upon being notified, reimburse her therefor, bears no kind of analogy to a case in which a contract exists, and a person especially interested in the assured or the beneficiary advances the premium as a gratuity, or on the assumption that the amount so advanced will be refunded by the interested parties. Whatever the intentions of the soliciting agent in the instant case may have been, the effect of her conduct was to attempt to pay the assured into a policy against his wishes, and in which she had no interest, except in the receipt of such resulting premiums as might come to her and the company, and on her alleged assumption that the assured desired to continue the protection.

The trial court met the witnesses face to face, weighed the evidence, and reached the conclusion that there was no liability on the alleged renewal contract, and we think that this conclusion is fully supported by the record; therefore, the judgment should be, and is hereby, affirmed.

Affirmed.

MORGAN, Judge, dissenting:

Action by the beneficiary on a policy for one year containing the following provision: "but it may be renewed subject to all provisions of the policy from term to term thereafter by the payment of the premium in advance." It had been renewed twice prior to this in-

stance by delivering a renewal receipt, the same as the following, delivered in this instance: "Received of William Grogan premium of Twenty-five and 50-100 Dollars continuing in force Policy C 121417 from the 6th day of September, 1909, to the 6th day of September, 1910, at noon, subject to all the conditions in original policy." The majority opinion discloses that the advance payment was waived in this instance, as it had been before. The minds of the parties had met on all the terms of the policy sued upon, including the manner of its renewal, when the policy was issued. It is especially true, in the issuance and extension of insurance policies, that the receipt and retention of the same, without rejection, in apt time, implies acceptance, and the risk attaches. The application for the extension in this instance was contracted for and implied in the original policy. When, by previous negotiations, or arrangement, the minds of the parties have met on a unilateral agreement and the same is delivered in a complete form, as in this instance, the acceptance of it is implied, unless it be rejected within a reasonable time. The only case cited in the majority opinion, that appears to be contrary to this view, is that of *Richmond v. The Travelers' Ins. Co.*, 123 Tenn., 307, 130 S. W., 790, 30 L. R. A. (N. S.), 954. In that case it is apparently conceded that, if there had been an application for the extension, the acceptance of the latter would have been implied by retaining the same, without objection; and, in that case, it must be noticed that the insured rejected the renewal and returned it within fifteen days after it was received, thus ending the matter.

The understanding between the insurer and its agent concerning the payment, by her to it, of the premium within the sixty days, and such payment by her, was intended to have the effect it actually did have, to extend the time for the insured to pay, and to avoid calling in

the renewal receipt and annulling or cancelling the policy. —2 May on Insurance, page 786.

The vague and indefinite language of the insured in his two letters indicated that he considered the policy in force, wherein he says in the first letter that he had about made up his mind to discontinue it. The agent so construed both letters, as shown by her letter asking payment for the time the policy had been in force. However, his announcement, November 26, in answer to the agent's letter demanding payment for the time the policy had been in force, of what his intention had been, or was then, could not annul the policy without the consent of the beneficiary and the insurer, after it had become effective by his implied acceptance and the absence of rejection, even though it estopped him from thereafter taking a contrary position; his conduct in keeping the renewal for so long, and his silence on receipt of the three separate requests to pay for it, including the information that the policy was in full force and effect, so long as he retained the receipt, gave the insurer to understand that he considered the contract complete, and the insurer so understood it, as shown by the agent's letters to the insured; and by the sixty days' arrangement and payment by the agent; therefore, the beneficiary had a vested interest in the policy which she could enforce, because the insurer left the policy in force and did not cancel it until after the death of the insured.

If a deed, bill of sale, lease, or extension of lease, insurance policy, or the extension of it, be executed and delivered according to previous negotiation, or arrangement, whereby the minds of the parties met, no overt act to show active acceptance is necessary to make a binding contract; the minds of the parties have met upon every conceivable feature, if there is any new feature introduced not arranged for, or if the delivery is upon a condition of advance payment, such condition may be waived,

as was done in this instance, or the instrument may be rejected, but the rejection must be timely.

According to the majority opinion, the insured could say at the end of the year, if the insurer chose to wait so long for payment, that he never intended to renew, and thus obtain his insurance free, at his option, if no loss occurred; the insurer could give him the entire year, and could accept payment at any time, if no loss occurred, but refuse in case of loss, by saying their minds had never met, if it could prove the secret thought of the insured. If the insured had returned to Denver without injury and had paid the premium, either for the year or up to that date, he would have paid for two and one-half or three months' insurance he never had, according to the majority opinion. The ample provisions of the law do not permit such uncertainty in contracts whereby both parties may suffer.

With due respect for the contrary view of my associates, it is my opinion that, when this unilateral receipt was *unconditionally delivered* to the insured and he kept it *without rejection*, for over two months and a half, the risk attached, and nothing said or done after that, except a cancellation of the policy, could divest the right of the beneficiary.—2 May on Ins., secs. 399 M., 399 P., 400. This insurance contract involved three parties. It was made payable to the beneficiary in case of death of the insured and her interest attached, when the contract was made, and continued, when it was extended. The original policy, containing a clause for a renewal from year to year, together with complete acquiescence in, and the meeting of minds upon, the terms of the policy, constituted a prearrangement for the delivery of the renewal receipt, unconditionally, without the formality of an application, and for immediate attachment of the risk, if the insurer chose to waive the advance payment of the premium, subject, only, to the right of the insured to

reject the renewal, and the consequent right of the insurer to cancel the risk; and if it chose to leave it uncanceled until the death, the beneficiary could recover.—*Adams v. Eidam*, 42 Minn., 53, 43 N. W., 690; *Travelers' Ins. Co. v. Jones*, 32 Tex. Civ. App., 146, 73 S. W., 978; *Waters v. Security L. & A. Co.*, 144 N. C., 663, 57 S. E., 437, 13 L. R. A. (N. S.), 805.

Decided February 11, A. D. 1914. Rehearing denied, April 13, A. D. 1914.

[No. 3937.]

MULFORD V. CENTRAL LIFE ASSURANCE SOCIETY.

1. APPEALS—*Law of the Case*. The construction of a contract by the supreme court, upon a former appeal, and its findings based thereon, are the law of the case in all subsequent proceedings. Contentions once resolved by the supreme court are not to be renewed in this court.
2. PLEADINGS—*Complaint Upon Contract—Requisites*. A complaint upon a contract, executory as to the plaintiff, must aver performance on his part, or set forth facts which excuse performance.

Error to Denver District Court. HON. GEORGE W. ALLEN, Judge.

MR. CARLE WHITEHEAD, MR. ALBERT VOGL, and MR. EDMUND J. CHURCHILL, for plaintiff in error.

MESSRS. THOMAS, BRYANT, NYE & MALBURN, for defendant in error.

CUNNINGHAM, Presiding Judge.

1. Plaintiff in error, hereinafter referred to as plaintiff, entered into a written contract with the defendant in error, hereinafter referred to as defendant, whereby plaintiff became financial director of the company, for the city and county of Denver, and assumed divers and sundry responsibilities and duties towards

the company, for which he was to receive, as compensation, a certain percentage of the premiums paid to the company on policies written by it in the city and county of Denver. Plaintiff becoming convinced that he had been induced to enter into the contract with the company for the sole purpose of securing from him a policy of life insurance (the written contract required him to take out a policy, and he did so, paying a premium thereon for the first year), and the premium thereon, instituted his suit in equity for the purpose of having the policy cancelled, and the whole amount of premium which he had paid returned to him. The case was first tried to a jury, and a verdict and judgment for a part of the premium going in favor of plaintiff, defendant appealed to the supreme court, where the judgment was reversed. See *Central Life Assurance Society v. Mulford*, 45 Colo., 240, 100 Pac., 423. The supreme court, in its opinion, has determined adversely to plaintiff many of the contentions which, without right or authority, he again renews in this court. We say without right or authority, because the construction of the contract by the supreme court, and its direct findings based thereon, have become the law of the case.

2. Among the findings or announcements contained in the supreme court's opinion, is one to the effect that:

“The contract between plaintiff and defendant was mutual and reciprocal. The benefits accruing to plaintiff were dependent upon his performance of a correlative duty. The only basis, under the evidence, for his claim that he is entitled to have the policy of insurance cancelled and the amount of premium paid returned to him, is that defendant did not account to him for the amount of the commission to which he is entitled, and did not perform other of its promises. Since the defendant was under no obligation with respect thereto, unless plaintiff observed the provisions of the contract incumbent upon

him to perform, it necessarily follows that his right to rescind and the return of his premium was not established, on account of his failure to perform his agreement with the company, which agreement on his part was in consideration of the promise by the defendant of commissions." (p. 245.)

Again, on the preceding page, referring to the same subject, the supreme court says:

"But if it be assumed, for the purposes of this case, that plaintiff was induced by fraudulent representations to enter into the contract, it does not necessarily follow that he is entitled to have his policy of insurance cancelled, or to recover the first annual premium which he paid. The taking out of the insurance was only one of the things which plaintiff was to do under the terms of the financial director's contract. There were other things which he must do before he is entitled to commissions. One of them is that he should diligently assist defendant in certain particulars mentioned, in the advancement of its business within his county. The jury found that he did not do so, and further found that he was not justified in his refusal."

Of course, we do not mean to be understood as supposing that the verdict of the jury, or the evidence offered in the former trial, should influence us here, but we have made the last quotation for the sole purpose of showing that the supreme court considered the obligations under the contract to be mutual and reciprocal, and as supporting our conclusion, which we shall now announce, as to the duty of the plaintiff in the matter of pleading. We find no allegation in plaintiff's complaint, or in his amended complaint which he filed after the case had been remanded, wherein it is averred that he performed, or offered to perform, the conditions and obligations imposed upon him by the contract. A complaint based upon a contract of this sort, which is silent upon

the question of plaintiff's performance, and contains no averments which, if true, would excuse performance, is fatally defective.—Sec. 72, Colo. Code Civ. Proc. (R. S.); 31 Cyc., 108; *Armor v. Fist*, 1 Colo., 148; *Jones v. Perot*, 19 Colo., 141, 34 Pac., 728; *Board of Public Works v. Hayden*, 13 Colo. App., 36, 56 Pac., 201.

In view of these authorities, the trial court did not err in sustaining the motion of the defendant to exclude all testimony under the original complaint.

3. There are other interesting contentions raised and debated in the briefs in this case which, under the view we take, we are not required to consider or dispose of. We desire to make this opinion as brief as possible, and incorporate, by reference, so much of the opinion of the supreme court above referred to as may be important, or as may aid in a consideration of the case.

4. The plaintiff has had two opportunities to try this case; the supreme court pointed out grave defects in his complaint, and yet, notwithstanding this, plaintiff went to trial a second time without any amendment of his complaint, or any offer to amend the same, until he was halted by the ruling of the trial court excluding all testimony under his original complaint; he then filed an amended complaint, in which he retained all the vices inherent in his original complaint, and insists in this court upon several contentions which the supreme court has explicitly ruled unavailing. We can only account for plaintiff's failure to plead performance on his part, or some explanation which would relieve him from the duty of performing the conditions imposed upon him by the contract, by the following declaration of the supreme court, in its opinion when this case was there on appeal:

“The jury found, and the evidence is all that way, that plaintiff declined and refused to assist the company in securing any business, as he agreed to do, and that he was not justified in the refusal.”

Of course, if the plaintiff did refuse, without sufficient excuse, to perform his part of the contract, he is to be commended for not alleging performance; but in that situation, he ought to have abandoned his case, after his former judgment had been reversed by the supreme court.

Judgment Affirmed.

KING, Judge, not participating.

Decided March 9, A. D. 1913. Rehearing denied, April 13, A. D. 1914.

[Nos. 3660, 3777.]

TANQUARY V. THE PEOPLE.

1. **BAIL—Forfeiture of Recognizance—Estoppel to Assert.** After many continuances a criminal information was stricken from the trial calendar, and the surety of the accused was expressly told by the district attorney that it would never thereafter be called for trial. The district attorney had then power to *nolle* any prosecution, without the consent of the court.

The bail, on the faith of the assurance so given by the district attorney, thereupon surrendered to the accused certain collateral which he had received, to indemnify him against liability upon the recognizance, and the principal left the state. *Held* that the statement of the district attorney was, in effect, leave to the accused to depart the court, and absent himself until lawfully required to return, and that the state was estopped to declare a forfeiture of the recognizance as against the surety.—*Haney v. People*, 12 Colo., 345, distinguished.

The effect of such a stipulation of the district attorney, since the adoption of c. 73, Laws 1913, not decided.

2. **RECOGNIZANCE—Conditions Not Specified in the Statute**, are not binding upon the surety. The condition that the principal "abide the order of the court" is of this character. Rev. Stat., sec. 1947.

3. **PRACTICE—Oral Stipulation of Counsel Not Denied.** is to be regarded as of equal force with a written stipulation.—*Morse v. Budlong*, 5 Colo. App., distinguished.

Appeals from Denver District Court. HON. CARLTON M. BLISS, Judge (3660); HON. GREELEY W. WHITFORD, Judge (3777).

Mr. CHARLES ROACH, for appellant.

Mr. JOHN A. RUSH, District Attorney, Mr. ROBT. H. KANE, Deputy District Attorney, for appellees.

KING, J., delivered the opinion of the court.

These two suits were actions of debt brought by the People of the State of Colorado to recover from N. Q. Tanquary and others the sum of \$1,500 and \$1,000 respectively, the penalties named in two bail bonds or recognizances. In each case the defendant Tanquary, one of the sureties, filed an answer containing two defenses. As the judgment against Tanquary must be reversed for error of the court in sustaining a demurrer to the second defense, it will not be necessary to make further mention of the first defense.

The complaint in the first case (No. 46699 of the district court) alleged that on October 24, 1908, Henry S. McDowell, as principal, and Albert Tomkinson and N. Q. Tanquary, as sureties, executed their bail bond or recognizance, the condition of which is as follows:

“That if the above bounden Henry B. McDowell shall personally be and appear at the fifth division of the district court of the second judicial district, sitting within and for the City and County of Denver, state of Colorado, on the 31st day of October, A. D. 1908, and from day to day and term to term thereafter, and remain at and abide the order of said court, and not depart the court without leave, then and there to answer unto a certain information herein pending against the said Henry B. McDowell for the crime of conspiracy to commit grand larceny and embezzlement, then this recognizance to be void, otherwise to be and remain in full force and effect.”

That by virtue of said bond McDowell secured his

release from custody; that thereafter he failed to appear in court from day to day, and term to term, and to remain at and abide the order of said court, and not depart the said court without leave, and that on April 14, 1909, the said McDowell and his bondsmen were called in open court, and default in said bond entered for failure of said McDowell to appear. The complaint in the second case (No. 48410 of the district court) and the defense thereto was in all material particulars the same as the complaint and defense in the first, so that the determination of one is necessarily decisive of the other.

For his second defense Tanquary alleged in substance that in the actions and proceedings wherein the bail bonds or recognizances set forth in the complaints were given, he was the attorney of record as well as surety for said McDowell; that after the recognizances were given he appeared in court with the said McDowell from time to time, and term to term, until the 16th day of March, 1909, at which time both he and the said McDowell were present in the fifth division of the said district court; that theretofore the said action had been on several occasions set down for trial, and in each instance the order of trial had been vacated at the request of the district attorney. As to the second case, it was alleged that on said last named date, and while the principal on said bond was in court, and ready to proceed to trial, and the said Tanquary as his attorney, was also in court for the purpose of proceeding with the trial of that cause, upon motion of the district attorney, the said action and proceeding was stricken from the trial calendar of the court. That then and there, because of the fact that he had so made and executed the said bail bonds as one of the sureties thereon, Tanquary asked the district attorney in open court whether the said actions and proceedings would ever thereafter be called for or brought to trial, and in response to said question said district at-

torney stated and represented to Tanquary that said actions and proceedings would never thereafter be called or brought to trial. It is further alleged that Tanquary informed McDowell of such statement so made by the district attorney; that defendant Tanquary had taken and held in his possession good and sufficient security to indemnify himself against any loss he might incur by reason of having executed the said recognizances, but that after being assured by the district attorney that the cause would not be further prosecuted, and believing that the cause had been abandoned by the state, he surrendered the said securities to McDowell, who thereafter left the state, by reason of which he was unable to surrender him into custody; that he had no knowledge or notice that further action would be taken or that said recognizances had been forfeited until the commencement of these suits; that because of the representations made by the district attorney, and his reliance thereon, resulting in the loss of his securities, and the departure of the principal recognizor so that he could not be surrendered by his surety, Tanquary prayed that the plaintiff be estopped from enforcing the forfeiture of said bail bond against him.

From time immemorial, two remedies have been recognized for the enforcement of a forfeited bail recognizance. The first remedy was by *scire facias*, directed to the sureties, requiring them to show cause why judgment should not be entered upon the debt acknowledged in the recognizance, and execution issue on the judgment; the other remedy was by an action in the nature of debt. The plea or answer in either case would be sufficient as a defense if it stated facts sufficient to show that final judgment should not be entered.—34 Cyc., 565; *People v. Watkins*, 19 Ill., 117; *Chase v. People*, 2 Colo., 481; *Hadaway v. Hynson*, 89 Md., 305, 315, 43 Atl., 806; *Wray v. People*, 70 Ill., 664; *People v. Bartlett*, 3 Hill (N. Y.), 570.

It will be observed that this defense does not challenge the validity nor sufficiency of the recognizance, nor deny that the forfeiture was entered, but does allege an equitable, if not strictly legal, reason why the forfeiture ought not to have been asked for by the district attorney, nor granted by the court, if the facts were within its knowledge, and why the forfeiture should be set aside and final judgment should not be rendered as against said surety. All the material allegations of that defense are, for the purposes of the demurrer, to be taken as true, and so taken they show beyond controversy that the district attorney acted in bad faith in stating to the attorney and surety that the suits would not be thereafter prosecuted, or in bad faith, or by inadvertence, in taking an order of default and forfeiture of the recognizance. His statement was equivalent to an express representation that the prosecution had been abandoned. It was, and was understood to be, leave granted by the district attorney, of whose authority we shall speak, to the defendant in that suit, to depart from the court. In this state at that time the district attorney had full power, without the consent of the court, and even against its will, to enter a *nolle pros.* as to any criminal charge, and abandon the prosecution.—*People v. Owers*, 23 Colo., 466, 48 Pac., 500. Such being the law at that time, we think the positive and unqualified statement of the district attorney made to the principal or surety in a bail bond that further prosecution would not be had, ought to be regarded as the act of the obligee, would constitute “leave” to depart the court, and, if acted upon in good faith, would be sufficient to justify such principal in departing from the court, and not returning thereto, until in some manner thereafter lawfully required to return. We are persuaded that if the surety, upon the faith of such statement, did, as alleged, release the said principal and surrender to him the security which he theretofore held, the state, in

equity and good conscience, ought to be estopped from insisting upon a forfeiture of said recognizance or taking a judgment thereupon as against the surety. Our conclusion is supported by the following authorities: *People v. Bartlett*, 3 Hill (N. Y.), 570; *Louisiana v. Moody*, 111 La., 199, 35 So., 516; *People v. Hammond*, 54 Hun, 635, 7 N. Y. Suppl., 219; *Niblo v. Clark*, 3 Wend. (N. Y.), 24; *Woodall v. Smith*, 51 Ga., 171; *State v. Moody*, 74 N. C., 73. To permit judgment to go against the defendant, in the face of these admissions, ought to be regarded as repugnant to the rules of law as it is inconsistent with common honesty.

It is urged that even though the district attorney granted leave to the defendant to depart from the court, yet, under the further condition in the bond or recognizance, that the accused should "abide the order of the court," the knowledge and acquiescence of the court as well as the knowledge and acquiescence of the district attorney was required. This contention is not tenable, if it is based upon the assumption that those words add anything to the terms of the bond. It is sometimes held that a recognizance which imposes conditions not specified in the statute requiring it, is void, but it seems to be universally held that such conditions are not binding on the surety.—34 Cyc., 543, and cases cited. Under section 1947, Rev. Stats. 1908, which provides for the statutory bail or recognizance, the sole conditions are as follows:

"* * * for the appearance of the indicted person or persons, on the first day of the next district court to be holden in and for such county, to answer said indictment, and not depart the court without leave."

The further condition imposed, to-wit, that the person indicted shall abide the order of the court, cannot be enforced as against the surety, so far as these words may be considered as adding anything to the statutory conditions of the bond.

It is also urged that the decision in the case of *Morse v. Budlong*, 5 Colo. App., 147, 38 Pac., 59, is decisive against the appellant in the case at bar. In that case it was held that the granting of a new trial upon the ground that the cause was tried *ex parte* in violation of an oral agreement between counsel was a matter resting in the discretion of the trial court, and that,

“Under a rule of the district court of Arapahoe County, which provides that ‘no verbal agreement of counsel with each other, with a party or with an officer of court, concerning the progress or management of any matter pending in court, will be enforced unless made in open court,’ stipulations and agreements require *three parties—the court being the third.*”—Rule 23, Dist. Ct., 2nd Jud. Dist. (Italics are ours.)

But it will be noted that the existence of said verbal agreement as alleged was denied by counter-affidavit, in addition to which a rule of the district court made to appear in the record was also considered; while in the case at bar the statement of the district attorney, that the cause would not be prosecuted, is admitted, and no rule of the court, if any existed, is preserved by the record. Moreover, under the *Owers* case the court is not a necessary *third* party to a *nolle pros.* or an abandonment.

In 36 Cyc., at 1281, it is said:

“It is often required by statute or rule of court that stipulations between parties or their attorneys shall be in writing, and where this is required no oral stipulation made out of court, will be deemed of any validity, except in so far as it is not disputed.”

The exception in that quotation is the rule in the present case. The allegation of the understanding between the attorney for the accused and the authorized representative of the state, is not disputed, and ought to be regarded as of equal force to a written stipulation.

The case of *Haney v. People*, 12 Colo., 345, 347, 29 Pac., 39, 40, is relied upon as opposed to the conclusion we have reached, because it was said in that case by Mr. Chief Justice Helm:

“Such records are public records in the nature of judgments, and import substantially the same verity as other judgments. Their impeachment is hardly less difficult than the impeachment of domestic judgments so situated that *scire facias* would, at common law, properly issue preliminary to the taking of execution.”

The decision in that case, has slight, if any, bearing in this case. The recognizance there under consideration was one taken before a justice of the peace, forfeited in that court and thereafter certified to the district court, whereupon it became a record not only of the bond, but of the forfeiture in the justice court, giving it the nature of a judgment to the extent of the forfeiture, and the language quoted had reference to such a record and judgment and the impeachment thereof for reasons affecting only the validity of the recognizance. The entire defense, so far as shown by the opinion, pertained to matters affecting the validity of the recognizance itself, and not to anything occurring after the execution of the bond by reason of which it is claimed that the forfeiture should be set aside or judgment should not be entered.

Recognizance is defined by Mr. Justice Elbert in *Connor v. People*, 4 Colo., 134, 135, as “an obligation of record entered into before a court of record or officers duly authorized for that purpose, with a condition to do some act;” and in *Parks v. United States*, 6 New Mex., 72, 27 Pac., 311, it is said, “A recognizance is a contract of record.” The forfeiture is a judgment, to the extent of the adjudication that a breach in some condition of the bond has occurred, but no further. Upon this adjudication of default or forfeiture, suit may be brought as for debt, but a judgment in any sum before service of sum-

mons in debt or a writ of *scire facias* would be void.—*Johnson v. State*, 3 Ark., 524; *Pinckard v. People*, 1 Scam., 187; *People v. Witt*, 19 Ill., 169. It is a misnomer to designate a recognizance as a judgment, and inaccurate to treat it as such in any of its aspects before forfeiture.

No claim is made that a legal or technical release of the recognizance has been made or was effected by the action of the district attorney. The contention is that the cause had been abandoned by the state, and that fact communicated to the defendant in the criminal proceeding, and to his attorney and surety; and therefore the discharge of said principal recognizor should have been duly entered by the court, and his sureties discharged from liability, and that such discharge should now be made. The sole purpose and function of the obligation was to produce the defendant in court, "then and there to answer unto a certain information herein pending against the said Henry B. McDowell." If the cause was in fact abandoned by the state, by reason of which the presence of the accused in court was no longer required or desired for trial or matters incident thereto, the purpose of the bond had been served, its function fulfilled and performed, and it should thenceforth be regarded as *functus officio*, and the formal discharge of the defendant and of his sureties therefrom should have been entered upon application. Any other view, it seems to us, is inconsistent with the office of the bond, and a refusal to discharge and release it after the prosecution had been abandoned would be grossly unjust and oppressive.

We are not unmindful of such decisions as *United States v. Van Fossen*, 28 Fed. Cas., 367 (1 Dill., 406), which hold that even the death of the principal recognizor will not relieve his sureties from their obligation to produce him in court; but, conceding that such cases or the preponderance of decided cases are against our

conclusion, we prefer to add one more to the respectable number that supports our conclusion, and better satisfies our conception of justice and equity. No consideration of public policy is presented in this case which is sufficient, in our opinion, to justify the judgment upon the bonds without requiring a reply fully and fairly putting in issue the allegations of the answer or avoiding their effect.

The conclusion at which we have arrived is limited in its application to the law as it existed when this case was instituted, as construed in *People v. Owers, supra*. Whether the defense interposed by the defendant in the instant case would be sufficient upon demurrer under chapter 73, Session Laws of 1913, we do not decide.

The judgment is reversed and cause remanded, with instructions to overrule the demurrer.

CUNNINGHAM, P. J., BELL, J., and HURLBUT, J., concur. MORGAN, J., dissents.

[No. 3633.]

SCOTT V. RAMSEIER.

1. COLOR OF TITLE—*Void Deed*, may be.

2. EVIDENCE—*Admissions in Pleading—Estoppel*. Ejectment. Defendant pleaded title under a tax deed recorded in 1899, and continued possession thereafter. He also pleaded a tax deed acquired under a tax sale made in 1903, for the tax of 1902, and, the latter deed being unassailable, defendant prevailed thereon. On appeal, plaintiff contended that defendant, being, by his own admissions, in possession when the tax of 1902 accrued, was under duty to pay it, and his purchase at the tax sale, so occasioned by his own wrong, must be construed as a payment of the tax. But the tax deed first pleaded by the defendant had been excluded by the court, upon plaintiff's objection, defendant's possession thereafter was denied, and there was no evidence of such possession. *Held* that plaintiff was not to be heard to set up, as the foundation of the estoppel asserted, defendant's allegations of a title which he had himself excluded.

3. **TAX TITLE**—*Duty of One in Possession of Lands to Pay the Taxes Assessed Thereon.* One in possession of lands under a void deed is not estopped to acquire title thereto, under a sale made for the non-payment of a tax assessed while he is so in possession.

Appeal from Yuma District Court. HON. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

MESSRS. ALLEN & WEBSTER, for appellee.

HURLBUT, J., rendered the opinion of the court.

Possessory action, under the code, instituted February 10, 1906. Complaint is in usual form, to which defendant (appellee) filed answer containing four defenses: First, general denial; second, pleading title in defendant under tax deed recorded February 15, 1899; third, pleading same title as in second defense, also that defendant and his grantors have held possession of the land at all times since recording the deed, and the five years statute of limitations; fourth, pleading title in defendant by virtue of a tax deed recorded December 27, 1906, which deed was founded upon public sale of the premises by the treasurer of the county December 7, 1903, for the delinquent taxes of 1902. Issue upon all new matter pleaded in the answer was formed by plaintiff's replication. The case was tried to the court without a jury, which found in favor of defendant and rendered judgment accordingly.

At the trial plaintiff showed a connected title to the premises from the government to himself. Defendant's effort to prove title under the second and third defenses failed, because the tax deed therein pleaded was void on its face, and was excluded from evidence.

The judgment appealed from rests upon the tax deed pleaded in the fourth defense. When this deed was offered in evidence plaintiff objected on the ground that

the answer having pleaded defendant and his grantors to have been in possession of the premises ever since the recording of the tax deed (February 15, 1899), it became defendant's duty to pay the delinquent taxes of 1902; that under such circumstances, defendant could not let the premises go to sale for delinquent taxes, become the purchaser, and claim title by virtue of a tax deed founded thereon; and that the tax deed of 1906 secured by him in this manner should only be construed as payment of taxes, and not as a purchaser of title. His objection was overruled by the court. This is the only point necessary to consider in this case, as its determination disposes of the appeal.

Appellant's theory is clearly stated and vigorously maintained, which is that, appellee having pleaded title to, and possession of, the land, under the tax deed recorded February 15, 1899 (void on its face), and having paid all taxes assessed thereon *up to* the year 1902, could not default in the payment of taxes for the year 1902, let the premises go to tax sale, purchase the same at the sale, and acquire any title thereby, but that such purchase would be deemed in law a payment of the taxes only.

Before proceeding to a consideration of the legal questions presented, it is essential to outline, as briefly as possible, the pleadings and facts as they appear from the record.

The third defense, as noted, pleads that defendant and his grantors "have had and held possession" of the land since the execution and recording of the tax deed referred to in the second defense. The replication denied these allegations. There is no evidence upon this issue, so that physical possession on the part of either plaintiff or defendant is not shown to have existed at any time. Constructive possession, however, is presumed to be in appellee by virtue of his established title from the government. Defendant's claim of constructive possession.

through his two tax deeds, cannot be sustained. One was void on its face, and the other is not shown to have been followed by actual entry.—*Morris & Thombs v. St. Louis Bank*, 17 Colo., 231, 29 Pac., 802; *Mitchell v. Titus*, 33 Colo., 385, 80 Pac., 1042.

Defendant pleaded in his answer that he had paid taxes on the property to the amount of \$100, and although this was denied in the replication, still, at the trial it was stipulated between the parties that the amount of taxes should be agreed upon between them. From this it is fair to presume that defendant and his grantors paid, probably, all the taxes upon the property from the year 1894 up to the year 1902. The first tax deed recorded, February 15, 1899, being void on its face, fixed no title in defendant or his grantors, but the same was color of title under which the taxes might be paid by defendant and his grantors. From the record, therefore, we find this situation: Plaintiff at all times held the legal title to, and was in constructive possession of, the premises, unless such title was nullified by defendant's tax deed, issued and recorded December 27, 1906.

Defendant offered in evidence in support of his second and third causes of action the tax deed of February 10, 1899, from the county to A. T. Lambert, which was based upon a tax sale of 1894. This deed was properly excluded from evidence, on objection, as being void on its face. Defendant then offered to prove title in himself through mesne conveyances from Lambert, but the court refused this proof, on objection by plaintiff, to which ruling defendant excepted. No cross-errors are assigned.

From the briefs it would appear that counsel for both parties are somewhat confused over this record. Both seem to think that the record fails to show the court permitted defendant to amend his answer to show who was the real purchaser at the tax sale of December,

sustained, because, as shown, defendant failed to prove any title, possession or ownership under the tax deed recorded February 15, 1899, or by, through or under, any other deed or conveyance prior to December 27, 1906. It is true defendant did plead title and possession under the tax deed recorded February 15, 1899, and the deed from Lambert to himself, but such plea was denied by plaintiff. Defendant utterly failed to sustain such issue, as we have shown. Plaintiff therefore cannot now be permitted to say that, notwithstanding his successful defeat of defendant's proof of title under this tax deed and conveyance from Lambert, defendant nevertheless *did have* such title and possession, in order that he (plaintiff) may invoke the rule of estoppel under consideration, against him. In other words, he cannot "blow hot and cold" at the same time.

Inasmuch as counsel have displayed great zeal and energy in the research of the law upon the rule mentioned, we append a partial list of the authorities cited by them, for what they may be worth to the profession.—*Whitney et al. v. Gunderson*, 31 Wis., 359; *Dubois et al. v. Campau, et al.*, 24 Mich., 360; *Lacey v. Davis and McFarren*, 4 Mich., 140, 66 Am. Dec., 524; *Bassett and Wife v. Welch*, 22 Wis., 175; *Smith v. Lewis et al.*, 20 Wis., 350; *Douglas v. Dangerfield*, 10 Ohio, 152; *Guynn et al. v. McCauley et al.*, 32 Ark., 97; *Jacks v. Dyer et al.*, 31 Ark., 334; *Cone v. Wood*, 108 Iowa, 260, 79 N. W., 86, 75 Am. St. Rep., 223; *Lybrand v. Haney*, 31 Wis., 230; *Thayer v. Hartman*, 78 Miss., 590, 29 South., 396; *Stubblefield v. Borders*, 92 Ill., 279; *Blackwood v. Van Vleit*, 30 Mich., 118; *Seaver v. Cobb*, 98 Ill., 200; *Oswald v. Wolf*, 129 Ill., 200, 21 N. E., 839; *Blackwell on Tax Titles* (5th Ed.), vol. 1, sec. 607; *Cooley on Taxation* (3d Ed.), vol. 2, pages 973-975.

In the above list positive and convincing authority can be found sustaining the proposition that one in possession of land under a void tax deed (which is the case

here) may purchase the property at a tax sale and claim title under a deed subsequently issued in pursuance thereof.

Discovering no error in the record, the judgment will be affirmed.

Judgment Affirmed.

KING, J., not participating.

[No. 3850.]

SPRINGER ET AL. V. PUCKETT.

1. APPEALS—*Verdict or Finding Below*, is conclusive in the court of review, unless clearly against the evidence, or the result of passion or prejudice.

2. MEASURE OF DAMAGES—*Breach of Warranty of Personal Property*. In an action for the breach of a warranty of personal property, after payment of but part of the purchase price, plaintiff recovers the amount paid; and where return of the thing sold has been tendered to the seller, moneys reasonably expended in the care and keep of the property subsequent to said tender.

Appeal from Denver District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. JOHN A. EWING, Mr. R. BURGE TONEY, Mr. CHAS. CLYDE BARKER, Mr. FRAZER ARNOLD, for appellants.

Mr. CHAS. A. JOHNSON, Messrs. STUART & MURRAY, for appellee.

HURLBUT, J., rendered the opinion of the court.

Action begun September 25, 1909, for breach of warranty growing out of the sale of a stallion. The complaint of appellee (plaintiff below) contains three causes of action: (1) The total failure of the animal to make good the warranties made by defendants at the time of sale; (2) for moneys laid out and expended in the care

and keep of the animal while endeavoring to secure foals from him; (3) for failure of the stallion to produce foals in a band of sixty mares, which is alleged to be the purpose for which he was purchased.

The case was tried to the court without a jury, and the court found for the plaintiff upon the first two causes of action, and against her on the third. The evidence is conflicting, but is amply sufficient to support the judgment.

It seems to be conceded without question that on or about February 25, 1908, plaintiff purchased from defendants the animal in question, under a warranty from defendants that he was a reasonably sure foal-getter, with healthy, sound mares, when well taken care of and properly handled. In fact it is improbable that plaintiff would have purchased him for the large sum of \$4,000 except upon some guaranty of his ability and capacity to produce the results for which he was purchased. The controlling question here appears to be, whether the contract of purchase was verbal or written. The evidence was very conflicting upon this point. The trial judge found that the contract of purchase of the animal was verbal, and entirely completed and executed on the morning of February 25, 1908, and that at that time plaintiff's check for \$500 and her notes and mortgage were all signed and delivered, and the animal delivered to her; and that the so-called bill of sale, which defendants claim was the contract, was not signed and delivered until the evening of that day, after the sale had been entirely consummated. Under the well-established rule, the determination of controverted facts by the jury or trial judge is binding upon our appellate courts unless it appears from the record that the verdict or finding was the result of passion or prejudice or was clearly against the evidence.—*Mackey v. Briggs*, 16 Colo., 143, 26 Pac., 131.

Plaintiff's evidence well tended to show that she was

the sole purchaser of the animal; that the contract was verbal, and fully consummated during the morning of the 25th of February; that at that time the notes and mortgage were executed and delivered, and the animal turned over to plaintiff; that on the same day, in the evening after dark, Blanchard (appellants' agent) appeared at plaintiff's house with some papers, one of which was the bill of sale mentioned, and that he requested both plaintiff and her husband to sign the same, stating that it was simply a receipt to show his principal what he had done with the horse; and that plaintiff signed the same without reading or hearing it read. While most of this evidence was controverted by defendants, and their testimony tended to show the contract of sale to be in writing, and embodied within the bill of sale, the court specifically found those issues in favor of plaintiff. The testimony was voluminous. The trial court heard the witnesses, had full opportunity to observe their deportment and manner while giving their testimony, and was in a position to best judge where the weight of evidence rested.

The evidence is conclusive that after two seasons' trial of the stallion he proved (with the possible exception of one colt) to be absolutely sterile; and the evidence was equally conclusive that the animal was utterly worthless for the purpose for which he was purchased; also that plaintiff's sole inducement for purchasing him for the large sum of \$4,000 was defendants' warranty of his high pedigree and sure foal getting qualities.

The court found on the first cause of action for the plaintiff in the sum of \$2,084, being the amount previously paid by plaintiff on the verbal contract; and \$960 on the second cause of action for the care and keep of the animal until the beginning of the second season.

The point is strongly urged by appellants that the court did not adopt the proper measure of damage. It

is conceded by both parties that the stallion would have been worth \$4,000 if he had been as warranted for breeding or other purposes.

There is some contrariety of opinion in the various jurisdictions of this country concerning the measure of damage in actions founded upon breach of warranty, but our own supreme court is the only guide we need consider. It might be well to here notice that both parties agree that this action is not one for a rescission of contract, nor an action based on fraud and deceit, nor one for breach of an executory contract, but is simply an action for breach of warranty.

In *Huston v. Plate*, 3 Colo., 402 (being an action for breach of warranty in the sale of a mare), the court, by Justice Thatcher, lays down the rule for measuring damages in such an action as follows:

“The measure of damages for the broken warranty is the same whether the action sounds in tort, or in contract. The ordinary rule is that the damages shall be measured by the difference between the actual value of the article at the time of the sale, if it had been as warranted, and its value with the defect.”

The case of *Tilley et al. v. The Montelius Piano Co.*, 15 Colo. App., 204, 61 Pac., 483, was an action based upon breach of warranty, and is analogous to the instant case in that only part of the purchase price of the article had been paid by the purchaser, which is the case here. The court said:

“The action being upon breach of warranty, the defendant was liable only, if liable at all, for the difference between the purchase price of the instrument and its actual value in its defective condition, if the purchase price had been entirely paid; or, if not, if the payment exceeded the value of the instrument, the measure of damages would have been such excess only.—*Schumann v. Wager*, 36 Ore., 65 [58 Pac., 770].”

The Oregon case there cited discusses the measure of damage in an action for breach of warranty where part of the purchase price only has been paid, and uses this language:

“The general rule is * * * that, where the contract price under a warranty of quality has been fully paid, the measure of damages is the difference between the amount paid and the value of the article furnished. But the one applicable here, where only a partial payment had been made, is that, if the amount paid exceeds the value of the monument furnished, the defendant is entitled to recover the excess of payment, and this is the measure of her ultimate damages; but, if the monument was worthless for the purpose intended, then the measure of damages would be the whole amount paid, and, if the reasonable value of the monument was greater than the amount so paid, then the plaintiff was entitled to recover the excess of such value over and above the payment. In no event could the defendant recover the \$85, unless the monument was utterly worthless.” See *Barr v. Baker & Baker*, 9 Mo., 840.

Following the rule announced in the cases just cited, it is clear that the district court in the instant case did not err in rendering judgment upon the first cause of action in the sum of \$2,084, as the record shows that only that amount had been paid on the purchase price of \$4,000; and the evidence is ample to warrant the court's finding that the stallion was worthless. See also *Snyder et al. v. Baker et al.* (Tex. Civ. App.), 34 S. W., 981.

Appellants further contend that it was error in the trial court to allow plaintiff the sum of \$960 under the second cause of action, for the care and keep of the animal up to the beginning of the second season, insisting, as we understand, that such damage could be allowable

only in case the stallion had been tendered back to defendants by plaintiff and defendants had refused to resume possession. If appellants are right in their contention as to the law on this point, then the record appears to bring this case clearly within the requirement. On June 20, 1908, being early in the breeding season of that year, plaintiff wrote a letter to defendants, therein complaining that she had been trying to breed with the stallion and had met with failure; that all his efforts up to that time indicated his total impotency; requesting them to come and see about the animal, saying that if they did not she would send him back to them; that she could not stand the expense of keeping him; that there was something wrong with him as to his breeding qualities; that if she did not hear from them she would put the horse on the train and send him back, etc. In answer to this letter defendants, on June 27, 1908, wrote a long letter to both plaintiff and her husband, in which they acknowledged receipt of her letter; expressed regret at her belief that the horse was a failure as a breeder; suggested that she was impatient and trying to determine the breeding qualities of the stallion too soon; stating that they had, on March 21st, sent her gratis an "impregnator;" insisted that it was entirely too early to determine whether or not the stallion was getting foals; and urged that she wait until the latter part of the season before arriving at a definite conclusion as to the breeding qualities of the stallion. The general tone of the letter was to urge plaintiff not to become impatient, but to continue further efforts to secure foals from the stallion, holding out hope that by keeping him and trying him he would certainly prove to be all right as a successful foal getter. On June 30th, July 15th, and July 30th, 1909, letters were written on behalf of plaintiff to defendants, again notifying them that plaintiff had utterly failed, after faithful effort, to secure any

foals from the stallion, and tendering him back to defendants, stating that she held him subject to their order, offering to take a good stallion in his place, etc. At no time, however, did defendants indicate their willingness to take him back.

Under these circumstances the trial court gave judgment for plaintiff in the sum of \$960 for the keep of the animal through the first season only, refusing to allow on that account any sum for the second season. We find in *Huston v. Plato, supra*, this further language:

“In addition to this measure of relief the plaintiff in this case might also recover the expenses of keeping the mare, if the court was satisfied from the evidence that the plaintiff had tendered the mare back to the vendor after discovering her unsoundness and the vendor had declined to accept her. These expenses would extend from the date of the offer to re-deliver to the vendor, over such a reasonable period as might, in view of all the circumstances, be necessary to make a fair sale of the mare.”

The following cases are in harmony with the rule just stated: *Raeside v. Hamm*, 87 Ia., 720, 54 N. W., 1079; *Love & Co. v. Ross et al.*, 89 Ia., 400, 56 N. W., 528; *Glidden v. Pooler*, 50 Ill. App., 36. Section 766, Sedgwick on Damages (8th ed.), reads, in part, as follows:

“Where an article is warranted fit for a particular purpose, the purchaser can recover the damages caused by an attempt to use it for that purpose. This sometimes gives a larger measure of recovery than would be allowed under the ordinary rule.”

Under the record showing here, the trial court did not err in rendering judgment for the \$960 for the care and keep of the animal during the first season.

Some other questions are urged and discussed by

appellants as warranting a reversal, but they do not appear to be controlling as against the conclusions we have reached.

We discover nothing in the record that would warrant us in reversing this judgment.

Judgment Affirmed.

KING, J., not participating.

[No. 3905.]

PUEBLO WATER COMPANY v. THE CITY OF PUEBLO ET AL.

CONTRACT—Municipal Corporation for Purchase of Water Works—Constructed. Plaintiff, the owner of certain water works, proposed to the City of Pueblo to purchase its plant, "said city to assume the outstanding bonded indebtedness," the amount of which was specified, the city council to accept the proposition "by resolution, thereupon the same shall become a binding contract * * * subject only to approval by a vote * * * at a special election called for that purpose." The city, by resolution, accepted the proposition, with the same proviso. An election was thereupon called and held, pursuant to the provisions of the statute (Rev. Stat., secs. 6803-6816); the proposition was approved, and the transaction was concluded, and a deed executed, some three months after the acceptance of the proposition by the city. Meantime, interest had accrued upon the bonded indebtedness, and it was claimed by plaintiff that by the resolution of the city council accepting the proposition of sale, the city became the equitable owner of the plant, and was therefore subject to the ordinary incidents and burdens of that relation, and liable for the interest subsequently accruing upon the bonded indebtedness. *Held* that the proposition of sale, and the acceptance thereof, were preliminary and provisional merely, made in contemplation of the provisions of the statute under which the matter was submitted to the people, that the provisions of the statute entered into and became part of the project, that nothing was or could be concluded until these were complied with, and that no title, legal or equitable, passed to the city until the conveyance was executed and possession delivered; that, therefore, defendant was not liable for interest accruing prior to such conveyance and delivery.

Error to Pueblo District Court. HON. J. E. RIZER, Judge.

Messrs. DEVINE & PRESTON and Mr. HENRY C. VIDAL for plaintiff in error.

Messrs. M. G. SAUNDERS and E. F. CHAMBERS for defendants in error.

MORGAN, Judge.

On October 25, 1906, the plaintiff, water company, commenced this action against the defendants, City of Pueblo, Public Water Works District No. 2, and Fraser, Ray and Covey as the Board of Water Works for said district, for the purpose of recovering an estimated amount for certain coal and other supplies which the water company had on hand at the time it conveyed its water works plant to defendant, city. After the complaint was filed, and probably before, a contention arose concerning the liability between the parties for the payment of the interest which had accrued between the date of the proposal to sell and the final transfer of the water plant on a certain bonded indebtedness which the city assumed and agreed to pay as part of the consideration. It was then stipulated and agreed that the defendants might pay the said interest without prejudice to their right to plead the same as a set-off against the amount claimed by the plaintiff. The defendants then paid the interest and in their answer pleaded it as a counter-claim, or set-off, as aforesaid.

The plaintiff stated in its complaint that the defendant district was created under the act of 1905, Sess. Laws 1905, p. 361, authorizing cities of 10,000 population, or over, to create water works districts for the construction, purchase or condemnation of water works; that prior to the creation of the district, under said law, the plaintiff made a written proposition, dated April 2, 1906, to the city of Pueblo to sell its water plant; that, on that date, and at the time of the creation of said water works district, the plaintiff was the owner of a certain water

works system and plant, that had supplied, and was supplying, with water, that part of the city of Pueblo in which the district was created; that after said written proposal to sell had been acted upon by the city, the water works district was created, a deed was given by the water company to the city for the plant, and everything concerning the sale was closed, on or about the first day of July, 1906, three months after the written proposal was made.

The sole question to be determined herein is, whether the grantor, water company, or the grantee, city, under the law and the facts, should pay the accrued interest on the bonded indebtedness between the date on which the proposition of the sale was made and date when the property was transferred; that is between April 1st and July 1st, 1906; no *specific* agreement having been made as to who should pay it, except that, in the proposition of sale and in the acceptance thereof by the city and the deed which the water company gave to the city, it was stated that the city should assume the bonded indebtedness of \$468,000 of the water company, and, in the deed, it agreed to pay it.

The only way to determine this question is to examine the evidence and ascertain, if possible, the intention of the parties, under the law and the facts, and apply the law as it may be found applicable thereto. In the written proposal of the water company the price was \$1,000,000, reserving the capital stock, books, cash on hand, water rates at the time the plant should be turned over to the city, and all other assets not a part of, or used in connection with, the plant; the city to buy the coal and other material and supplies on hand when the plant should be turned over, and pay for the same, in addition to the \$1,000,000. The written proposal is set forth in the complaint and contains the following:

“Said city to assume and agree to pay the present

outstanding bonded indebtedness of the water company, which amounts to \$468,000." * * *

"The city council of said city shall accept this proposition by resolution, thereupon the same shall become and constitute a binding contract for the sale and purchase of said water works and property at the price and conditions herein set forth, subject only to the approval thereof by a vote in favor of such purchase and terms by the majority of the legal votes cast at a special election to be called by the city council for that purpose."

After this proposition was made, the council adopted a resolution containing the following:

"That said proposition of said water company be and the same is hereby accepted for and in behalf of the city of Pueblo; and it is hereby agreed that the city of Pueblo will purchase said water works system and plant, for the use and benefit of that portion of said city lying south of the Arkansas river, upon the terms and conditions set forth in said proposition, *provided* that a majority of the legal votes cast at the special election to be called for that purpose by this council, and to be held in that part of the city before mentioned, shall approve and be in favor of said terms and conditions."

Thereafter, on June 4, 1906, after the election was held, and the vote was canvassed and found to be in favor of such purchase, another resolution was adopted by the council containing the following:

"That the City of Pueblo has purchased, and it does hereby purchase and take, for the use and benefit of Public Water Works District No. 2 of the City of Pueblo, Colorado, being all that part of said city lying south of the Arkansas river as it runs through said city, the water works plant and property of The Pueblo Water Company now established and existing in that part of said city embraced in said district, at the price and upon the terms and conditions expressed in said written propo-

sition of said water company, dated and filed with the city clerk on the 2nd day of April, 1905, which proposition was, on April 9th, 1906, by resolution, duly adopted and approved, accepted by this council for and in behalf of said city, and it was by said resolution expressly agreed that said water works plant and system would be purchased by said city upon the terms set out in said proposition, for the use and benefit of said Public Water Works District No. 2, provided that a majority of the legal votes cast at the special election called by this council to be held on May 19, 1906, should approve and be in favor of said purchase; which approval has been given by such majority vote as hereinbefore recited, and said purchase has now become a binding obligation upon both parties to said agreement." The resolution then provided for issuance of bonds to pay for the plant.

On June 26, 1906, thereafter, a deed of conveyance was accepted, conveying the property to the city, in which the written proposition aforesaid was set forth in full; said deed also contained the following in the habendum clause:

"Free and clear of all former and other grants and incumbrances of whatever kind and nature, save and except a certain mortgage given to secure the payment of bonds of the water company to the amount of \$500,000, of which bonds there now remain outstanding and unpaid the sum of \$468,000, which the said party of the second part hereby assumes and agrees to pay."

It is assumed in the argument of counsel that the property was turned over to the city on July 1, 1906, just three months after the proposition of sale was made. Very soon thereafter, July 5, 1906, the council adopted another resolution, accepting the deed, which contained the following:

"That the said deed so tendered and delivered be and the same is hereby accepted for and in behalf of the

city of Pueblo, for the use and benefit of said Public Water Works District, as and for the full performance and compliance by said water company with the terms and conditions of its said proposition;" the resolution thereafter providing for the issuance of bonds necessary to pay the balance of said consideration over and above the debt assumed, and for the purpose of authorizing the issuance of bonds to pay off the debt that was assumed.

It is contended by the plaintiff, water company, that the proposition was *unconditional*, and, upon its acceptance, a binding contract existed, and that, under the circumstances, the purchaser became the *equitable owner* and thereby subjected to the ordinary *incidents* and *burdens* of such binding contract; and, therefore, that defendants are liable to pay the interest from April 1 up to July 1 on the indebtedness assumed. The water company, it seems, paid the semi-annual interest that became due on April 1, which was the day before the written proposition was made, and nothing was said about payment of interest falling due on the following October 1, until the latter date, or until this suit was commenced. Defendants concede the law to be that, when a contract of sale is completed, the equitable title passes to the vendee, but contend that the aforesaid facts and circumstances do not justify its application until *after* the *purchase* and *sale* is *finally consummated*, contending that the negotiations, up to the final execution of the deed and transfer of the property, were *conditional* and *depended* upon the *creation* of the water district, and the *authority conferred by the special election*, upon such district, when created, to *purchase* and *pay for* the property, and that therefore the defendants are not liable for any interest on the debt assumed *prior* to such final transfer.

Plaintiff further contends that under the proposi-

tion of sale, itself, *aside* from the law transferring the equitable title aforesaid, the plaintiff is not liable for this interest, and calls attention to the words of the written proposition, to-wit: "The city to assume and agree to pay the present outstanding bonded indebtedness;" and contends that this *includes* the incidents of that indebtedness, and that *interest* is one of the *incidents*.

Plaintiffs further contend that defendants are liable under the *terms* of the *deed* and are *estopped* from denying liability by reason of the acceptance thereof in its resolution of July 5, aforesaid.

Defendants, to sustain the judgment of the lower court, maintain that the actual making of the purchase and sale under the negotiations were in contemplation of the law of 1905, and depended entirely upon the result of the special election creating the water district and authorizing the purchase aforesaid, and that, until such district was created and such authority given, no binding contract could be made; contending that the city council could do nothing permanent *prior* to such authority, and that its action upon the written proposition aforesaid in accepting it amounted to nothing more than to accept it as a *sufficient proposal to be submitted* to the voters, and contend that the statute expressly requires the question of whether a system *shall be purchased* shall be submitted to the voters, and that a proposition of purchase could not be submitted unless a proposal of sale is submitted with it, to the end that the voters may accept or reject it, and cite the following section of the law:

"The said board of water works shall have power *to enter into* all contracts, in the name of the district, and to do all things necessary to provide a system of water works for said district as provided by this act, and for the management, operation and control thereof."

The defendants then contend that, under the pro-

positional and resolution acting on it, and the deed of conveyance, the plaintiff should pay the interest. The defendants concede that interest is an *incident* to a debt, and that when defendant agreed to assume the debt such assumption included the interest subsequent only to the final transfer. Defendants then say that the proposition was that the city should assume the *present* bonded indebtedness, \$468,000, on the date of the proposal, at which time no interest was unpaid, and that, as the deed so accepted contained this proposal and the assuming clause stated the same to be \$468,000, that no greater sum could be inserted; quoting from *Cramer v. Lepper*, 26 Ohio State, 59, 20 Am. Rep., 756, as follows:

“As between Cramer and Lepper, the vendor and purchaser of the equity of redemption, we think the court of common pleas rightly construed the contract in holding Cramer to the payment of the interest which had accrued on the note and mortgage prior to April 1, 1869, the date of the conveyance. This construction is sustained in view of the fact that the amount of the mortgage debt assumed by Lepper is stated in the contract at \$2,500, the principal of the note only; *and especially as the principal debt, excluding interest, fully and exactly, when added to other specific sums agreed to be paid, amounts to the sum agreed as the price to be paid for the mortgage premises.*”

In answer to the plaintiff's claim of estoppel, the defendants cite several authorities, to the effect that no estoppel arises, on the ground that “individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity;” and that “no sort of recognition can make good an act without the scope of the corporate authority.”

It is unfortunate that the interest that would necessarily accrue on the bonded indebtedness subsequent to the written proposal and prior to the final transfer of

property was not specifically mentioned in the proposal or in the acceptance, but it seems to us that defendants' contention is sound: that the proposal and the action of the council thereupon was preliminary, only, and made in contemplation of the law of 1905, and that the written proposal and the deed bind the plaintiff to pay all interest on the bonded indebtedness up to the time when the city took over the property. It seems to us that, aside from the allegation in the complaint that the "plaintiff was the owner at the time of the creation of the water works district," neither the equitable nor the legal title, under such circumstances, passed to the city until the deed was executed and possession delivered. The law under which the purchase and sale were made *entered into* and *became a part* of the negotiations, and, as no purchase could be made *until that law was complied with*, all negotiations must necessarily have been in contemplation of, and subject to, such law; and that it was not the intention of the parties to consider that any sale was made *until the special election* was held, *authorizing* it, and the *property transferred* thereafter. The proposal and the acceptance, both, say subject to the majority vote at the contemplated special election, and provide for issuance of bonds thereafter, and the delay incident thereto; and say, further, that such proposal and acceptance should be void if the majority vote should be against the proposed creation of a water district and the proposed purchase. Neither party was responsible for the necessary delay, directly, but both parties, contemplating the law of 1905, were compelled to *wait until such law was complied with before the sale could be made* and the bonds issued to complete it.

If it had been intended that the equitable title to the property should vest in the defendant city when the proposal was accepted, the resolution would not have contained the proviso and the words "*will purchase*:"

and the proposal would not have contained the words "subject to the majority vote," etc., nor the provision that "the property is to be conveyed and turned over when said bonds (to be issued to pay for the property) are ready for delivery." Furthermore, several other matters would have been provided for; for instance: interest on the balance of the purchase price in excess of the amount to be assumed; the profits, over and above expenses, during the interval, and necessary repairs incident to a "going concern." The company might contend that, as it reserved the income, it would be inferred that it would pay expenses and keep up repairs, but the proposal does not say so. It might say that it might be inferred that the interest on the money invested would be received by it in the water rates reserved, but this would include the interest in controversy.

While the law is plain, as claimed by the plaintiff, that when a valid contract of sale of real property has been *consummated*, the equitable title becomes vested in the vendee, yet the purchase and sale of the property in this instance was *not consummated* until the deed was accepted and the property delivered. All negotiations were subject to, and dependent upon, the future culmination thereof under the law of 1905, thus providing an insurmountable condition necessary to be removed before a sale could be made, and that could be removed only by the special election and the issuance of bonds thereafter.

Plaintiff cites *Water Company v. Galena*, 74 Kan., 644, 87 Pac., 735, and contends that it is decisive of the issues here, but the circumstances of that case are not the same as this. In that case the parties, by ordinance granting a franchise for twenty years with the right to purchase at the end of fifteen years, had agreed upon everything when the ordinance was passed, August, 1904, except the price, which was to be determined as pro-

vided by the ordinance by agreement or through a proceeding in court. The parties could not agree and the court finally determined the matter December 21, 1905, and decreed that the city of Galena should pay the amount decreed, as of August 1, 1904, with interest from that date on the amount to be paid in cash, and that the city should assume a mortgage for the remainder and pay the interest on that from August 1, 1904; and *that the water company should allow the profits since that date to go to the city as a credit on the purchase price.* [Italics ours.] In the instant case the water company contends for the profits and interest also on part of the purchase price.

In that case it may be seen that it was the value alone that was not determined, while in the present case the very purchase itself had to be determined by the special election; and the written proposal aforesaid specifically provides that "property is to be conveyed and turned over when said bonds are ready for delivery," meaning the bonds to be issued to pay for the property. In that case the ordinance gave full power to contract and there was no condition in the way of the passing of title, but the allowance of all profits to the city is an element of the adjustment in that case upon an intention of the parties as to the passing of title exactly opposite to the clear intention here.

The conclusion is that the judgment of the lower court, that plaintiff should pay the interest in controversy, thus allowing the set-off, and giving judgment for the plaintiff for the balance due for the coal and supplies sued for, after deducting the amount of the interest, was correct, and hereby is affirmed.

Decided March 9, A. D. 1914. Rehearing denied April 13, A. D. 1914.

[No. 3722.]

BUCKLAND ET AL. V. FIEDLER ET AL.

1. **TAX TITLES—*Void Deed.*** A treasurer's deed showing affirmatively but one offer for the lands, and a sale to the county on the day of such single offer, is void upon its face.
2. — ***Deed Construed.*** A deed reciting that the treasurer did, on July 11th, at a sale begun, etc., on July 7th, expose to sale the real property, etc., and the county having offered to pay the amount of taxes, etc., the property was stricken off to it, *held* void.
3. — ***Limitation.*** A void deed does not set in motion the five years' limitation. (Rev. Stat., sec. 5733.)

Appeal from Summit District Court. HON. CHAS. CAVENDER, Judge.

Mr. JOSEPH N. BAXTER for appellants.

Mr. JAMES T. HOGAN and Mr. QUENTIN D. BONNER for appellees.

BELL, J.

The complaint in this action is the ordinary one under section 255, Mills' Annotated Code, to quiet the title to the Tempest Lode Mining Claim, U. S. Survey Lot No. 1854, in Snake River Mining District, Summit County, Colorado, and praying that the defendants be required to set up their title or estate therein, as provided by the code, and that, upon the final hearing, the claim of title estate or interest made by the defendants be declared to be invalid and of no effect, and that the title of the plaintiffs to the premises be quieted and confirmed in them. The defendants, David J. Cook and Mary Singleton, nee Lowe, deraigned a title in fee simple from the government of the United States, through a patent of said premises, to themselves, to an undivided three-fourths interest therein, and allege that one Alice M. Hardenbrook, a non-resident of the state, who was served

by a publication of the summons, without a copy being mailed to her, claims to have and own the remaining one-fourth interest in the premises. It is further averred in the answer that the defendants, Joseph N. Baxter and Joseph N. Baxter, as trustee of the estate of Samuel Milton, deceased, have a lien on the said interest of Mary Singleton, nee Lowe. The other defendants disclaim any interest in the premises, and no appearance has been entered for the said Alice M. Hardenbrook.

For a second defense, defendants allege that the only claim of title of the plaintiffs is under a tax deed dated December 5, 1898, issued by the county treasurer of Summit County, Colorado, to the plaintiffs, based on a tax certificate obtained by said county and assigned to the plaintiffs. The defendants allege that said tax deed is void upon its face, because, among many other things, said property was not offered and re-offered for sale, as required by law, before the same could have been bid in by the county of Summit. The defendants also filed a cross-complaint setting up the same facts, in substance, as appear in the new matter in the answer, then make an offer of a return of the money paid for said certificate, together with all taxes, costs and penalties which the court might adjudge to be due and payable, and, thereupon, pray that said tax deed be cancelled; that the title to the premises be confirmed in the defendants, and for general relief. The plaintiffs made no reply to the allegations and deraignment of title in the first cause of defense in the answer, but denied the allegations in the subsequent causes of defense. At the trial the plaintiffs introduced the tax deed in evidence, the recitals of which, in part, read as follows:

“The treasurer of said county did on the 11th day of July, A. D. 1890, by virtue of the authority vested in him by law, at the sale begun and publicly held on the 7th day of July, A. D. 1890, expose to public sale,

* * * in substantial conformity with the requisitions of the statute, * * * the real property above described, for the payment of the taxes, interest and costs then due * * * ; and whereas, * * * the county of Summit, in the state of Colorado, having offered to pay the sum of seven dollars and eleven cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on said property, * * * which was the least quantity bid for, and payment of said sum having been made by it to the said treasurer, the said property was stricken off to it at that price."

The recitals fully establish the allegation in the answer that said property was not offered and re-offered by the treasurer before it was stricken off to the county. The deed states that the county treasurer on the 11th day of July, 1890, did expose to public sale this property and that the county bid \$7.11 for the whole thereof, and this being the least quantity bid for, the property was stricken off to it. It has been repeatedly held by this and the supreme court that where the recitals of a deed affirmatively show but one offer of a piece of real property for sale, and that a sale thereof is made to a county, on the first day of the offer, such deed is void upon its face. The law does not provide for a bid by a county on the offer of real estate, as recited in this case, nor for its paying the cash on a bid, as herein recited. The statute provides that, if no bid is made for any tract of land, the treasurer shall pass it over and re-offer it at the beginning of the sale the next day, and that the same must be re-offered from day to day until the treasurer becomes satisfied that the same cannot be sold at such sale, then the treasurer shall strike it off to the county. A cash purchaser may buy the first time land is offered, or at any subsequent period, but a county cannot purchase on the first day, or while there is a reasonable hope to find a cash purchaser on any subsequent day during the con-

tinuance of the sale.—*Dyke v. White*, 17 Colo., 296-300, 29 Pac., 128; *Charlton v. Toomey*, 7 Colo. App., 304, 43 Pac., 455; *Bryant v. Miller*, 48 Colo., 192-196, 109 Pac., 959; *Lambert v. Scott*, 53 Colo., 357, 358, 127 Pac., 142.

Under the above authorities, the tax deed is manifestly void upon its face, and being void upon its face, it could not set in operation the five-year statute of limitation.—*Carnahan v. Hughes*, 53 Colo., 318-19, 125 Pac., 116.

The trial court, therefore, erred in finding the issues for the plaintiff's quieting their title and decreeing the title of the defendants to be void. Wherefore, the decree of the trial court is reversed, the case remanded and the court directed to enter a decree for the defendants, quieting and confirming their title in them against any and all claims of the plaintiffs, or of any person or persons claiming under or through them, and to decree said tax deed to be void and of no effect, and that the same be cancelled, upon the defendants paying into court for the use of the plaintiffs, within a reasonable time, an amount sufficient to reimburse them for the amount for which the land was sold at the tax sale, with interest and penalties as prescribed by statute, including subsequent taxes paid by them and interest thereon; and the costs of this suit is hereby ordered to be taxed to the appellees.

Reversed and Remanded.

[No. 3910.]

STUART V. COUNTY COMMISSIONERS OF JEFFERSON COUNTY.

1. IRRIGATION—*Right of Appropriator in the Means Provided for the Conduct of Water.* As a stockholder in an irrigating company, the plaintiff had a right to receive therefrom water for the irrigation of his land, and, by long user, to conduct it through an open ditch located upon the lands of an individual defendant. Held that neither such in-

dividual defendant, nor the county, nor the town where the premises were situated, was entitled to fill up or obstruct or destroy the open ditch, substituting another device therefor, without the consent of plaintiff, after full knowledge on his part, or until provision was made, satisfactory to plaintiff, that the change should not interfere with the supply of the volume of water theretofore enjoyed by him, or its distribution, and for the maintenance, in like manner of the substituted device, and compensation to plaintiff of all damages occasioned to him by failure in such engagements, and that the former conditions should be restored if the substituted device were found inefficient, or the agreement should not be complied with.

2. — *Irrigating Company—Duty to Stockholders.* A corporation operating an irrigating ditch is without authority to consent to any change in its works or conduits, for the benefit of one stockholder, and to the prejudice of another, without the consent of the latter, after a full knowledge of what is proposed, and with whatever provision for his protection he may demand as the condition of such consent.

The corporation is bound to see to it that the stockholder receives his proportion of the water with as little expense and inconvenience as if the change were not made, and without imposing upon him any increase in the cost of delivery, or any burden of maintaining or replacing the substituted device.

3. — *Waste Water.* A corporation operating an irrigating ditch is not under duty to carry water in excess of its decreed appropriation; nevertheless, if there is at any time surplus water in the ditch, any stockholder having need thereof is equitably entitled thereto, even though it may be in excess of the allowance, to which, measured by his holdings in the stock, he is entitled. And the stockholder having need of the water is entitled to complain if the corporation unnecessarily wastes it where it is of benefit to no one.

4. *PLEADING—Demurrer.* Failure to state in the complaint facts constituting a cause of action, or failure to show jurisdiction in the court, is ground of demurrer at any time, and it seems the defendant may demur *ore tenus*.

5. — *Demurrer in Answer.* The practice of inserting a demurrer in the answer discountenanced.

6. — *Waiver.* Misjoinder of causes of action not raised either by demurrer or answer is waived.

So of defect of parties.

7. *PARTIES—Defect of,* must be raised by demurrer or answer, or is waived.

8. — *Defendant.* One acting for a town in the transaction complained of should not be made defendant, but the town itself.

9. WRIT OF ERROR—*Judgment.* In an equity cause the decree for the defendants being found erroneous was reversed, with directions to the court below to exercise a liberal discretion in allowing an amendment of the pleadings, the bringing in of a new party, and to receive, upon the second hearing, the evidence taken upon the first.

Error to Jefferson District Court. HON. GREELEY W. WHITFORD, Judge.

Mr. T. B. STUART, Mr. C. A. MURRAY, and Mr. J. E. McCALL, for plaintiff in error.

Mr. GEO. B. CAMPBELL and Mr. WM. N. VAILE, for defendants in error.

BELL, J.

It appears from the record that more than a half-century ago the Mining Ditch was constructed from a head-gate on Clear Creek, a natural stream, to the premises now owned by Thomas B. Stuart, plaintiff and plaintiff in error, in Jefferson County, Colorado, with a carrying capacity of $3\frac{1}{2}$ cubic feet of water per second of time, and that the owners of said ditch carried water there-through and put it to a beneficial use on said premises in washing a number of acres of gravel for placer gold. In 1883, The Wadsworth Ditch Company was incorporated as a mutual water company, for mining and irrigation purposes, with 96 shares of stock, taking over and absorbing said Mining Ditch, or the greater part thereof, as the Wadsworth Ditch. The first appropriation of $3\frac{1}{2}$ cubic feet from Clear Creek was adjudicated to the Wadsworth Ditch as Priority No. 1 from Clear Creek, based upon said beneficial use, and the second appropriation of $9\frac{1}{2}$ cubic feet per second of time was decreed to said Wadsworth Ditch, as Priority No. 48. The ditch runs through the town of Arvada, in said coun-

ty, from the western to the eastern boundary, and a number of the stockholders and officers of the company reside and own property in said town, and, at the time complained of, were officers also thereof, and watered their town premises, more or less, from the waters of said ditch. In 1899 and for a long period of time subsequent thereto, one Lloyd J. Caldwell owned the entire premises now possessed by Stuart, and the defendants Davis, Nelson and the Hamiltons, all of which were watered through said Wadsworth Ditch, and all of which are situated east of Graves Avenue, except the premises now owned by Davis, which are situated immediately west of said avenue, and the premises owned by Stuart. Said Graves Avenue seems to be a common thoroughfare passing through said town and county, and maintained jointly by them. Plaintiff, and the defendants Nelson, and the Hamiltons, are and were, the only users of water from the ditch east of Davis' premises, and received the same from the main ditch at three points on the eastern boundary of said premises, and conducted it across said avenue in three gravity flumes. The tail waters of the ditch were conducted across said avenue in one of those flumes, and partly supplied to Nelson, and partly wasted over the premises of Stuart into Ralston Creek, a tributary of Clear Creek. Stuart also received water from another point in said main ditch, and conducted it in a syphon, under said avenue, in sufficient quantities only to irrigate about 83/100 of an acre of lawn and shrubbery about his buildings. This syphon was originally built by Caldwell, when he owned said premises, under the direction of the officers of said town, and with material furnished him therefor, as a substitute for a small wooden flume which he had placed under said avenue for the purpose of carrying water to his premises to be used in mixing mortar for building purposes. During all the times herein mentioned prior to the changes com-

plained of, the whole of said Wadsworth Ditch was an open gravity ditch running upon a regular grade, and said ditch company owned an unquestioned easement necessary for the convenient use and maintenance thereof. It ran along the entire southern boundary line, and more than half along the eastern boundary line of the premises now owned by Davis, and was in use and operation at the time of his purchase of said premises. In the year 1909, the defendants Davis, Nelson, Hamiltons, and The Wadsworth Ditch Company agreed among themselves to, and did, divert the waters of the ditch belonging to said Nelson and the Hamiltons at a point near the western boundary of the premises of Davis, and made a spillway at said point of diversion for the wasting of any surplus water that might come down said Wadsworth Ditch, so that no one would be required to use any part of the ditch east of the western boundary of the Davis land, except Stuart; and, under this agreement, Davis, with the consent of the defendants just named, and over the protests of Stuart, destroyed the open ditch across his premises, including the head-gates of the plaintiff, and the tail-gate of the ditch company, and substituted therefor a line of 12-inch earthen pipe buried along his southern line. At the same time that those changes were made, the town of Arvada and the county of Jefferson lowered Graves Avenue between the premises of Davis and Stuart from 3 to 5 feet, and thereby destroyed the connections to several of the ditches on Stuart's land, made difficult the entrances to his driveways, damaged the general condition and appearance of his premises along said avenue, and substituted a 12-inch syphon for the flumes and syphon that theretofore conducted his water from the main ditch on Davis' premises. Plaintiff made a good-faith effort to use the changed conditions forced upon him against his protests, but said pipe line at times became clogged with

mud, and, when there was not a full flow at the end of the ditch, there was not sufficient pressure to force the water through the pipe onto his premises, and two large reservoirs, which he owned near his buildings for the use of his fowl and domestic animals, and a complete system of irrigation ditches throughout his premises went dry, and were rendered useless; and the witnesses testified that, if those changed conditions were allowed to continue, the property, which is said to be worth from ten to forty thousand dollars, would be damaged to the extent of one-half of its value. Soon after Davis purchased his premises, he notified Stuart and the secretary of the ditch company that he had taken counsel and was advised that he had a right to destroy the open ditch upon his premises and substitute a buried pipe therefor, and announced his intention of acting under this advice; and it was also made known about the same time that the change in Graves Avenue was contemplated by the town and county authorities. The plaintiff, the secretary of the ditch company, and the husband of defendant Nelson, protested against the intended changes, and, after conferring with the secretary of the ditch company, plaintiff agreed to withdraw his protests if Davis would agree in writing to make such changes only as would not interfere in any manner with the supply and distribution of the water theretofore enjoyed by plaintiff, Nelson, and the Hamiltons, and further agree to maintain such changed conditions in like manner, and be responsible for all damages occasioned by his failure so to do. Stuart prepared a proposed agreement to this effect and submitted it to the secretary of the ditch company for the signature of Davis, who refused to sign it, and the changes as herein recited were proceeded with and made over Stuart's vigorous and renewed protests, in violation of his vested rights and interests and to the great damage and destruction of his property. The evidence as

far as introduced indicates that the ditch company, Davis and the officers in charge for the town of Arvada, and the county of Jefferson were co-operating to destroy the open ditch on the premises of Davis and reduce the grade of Graves Avenue. It has not been shown that those changes would benefit either the ditch company or the plaintiff, but it is contended by the company that the change in the highway was a necessary improvement; that the substituted pipe and syphon is a change which benefits Stuart; that he accepted and approved of the same, and is, therefore, estopped from complaining against it; and it is urged by the defendants that he constructed a cement ditch on his premises in his preparation to meet the changes. The evidence, however, utterly contradicts all statements in the pleadings or elsewhere to the effect that he consented or intended to consent to any of the changes, other than as set forth in the agreement proposed and submitted for the signature of Davis. He admits that he built the cement ditch at a cost of about \$25.00, and shows throughout his evidence that, while those changes were being imposed upon him against his written protests, he did everything within reason to accept the changes if they would not considerably interfere with the rights and benefits theretofore enjoyed by him. In the agreement proposed by him he reserved the right to have the old conditions restored if the changes should prove to be inefficient, or if Davis should fail in his duties to maintain them, and at all times he insisted that the changes, if any, should be such as not to interfere with the supply and distribution of water enjoyed by him, Nelson and the Hamiltons, including all waste water, previous to any such changes. Notwithstanding his protests and demands, the evidence shows the continued inefficiency of the new methods to carry even two shares of water that belonged to him individually, and he testified that the spill water was changed

to a point from 3 to 5 feet below his property, so that it is impossible to receive any thereon. The terms insisted upon by him in his proposed agreement were most reasonable and usual under the conditions that existed, and his attitude throughout, as evidenced by the proposed agreement, and his many letters to the parties concerned, shows a generous public spirit, and a generous desire to accommodate his neighbor, and the public, by accepting a sufficient substitute for the open ditch, with proper guarantees that such substitute would be installed and maintained by and at the cost of the parties benefiting thereby. He asked no more than he was entitled to and could have recovered had the changes been made under the right of eminent domain and the proceedings thereunder, and it was confiscatory of his vested rights to destroy the open ditch in the manner resorted to against his protests. It cannot be said that the defendants could impose upon him the underground pipe and syphon, unless they assumed the responsibility for its proper installation and continued maintenance, so as not to interfere with his vested rights. Both our state constitution and statutes protect the individual in his vested rights and prohibit the taking thereof for public or private use without condemnation under proper proceedings and just compensation given therefor.—Const., Art. II, Secs. 14, 15; Mills Revised Statutes 1912, Vol. 1, Sec. 2616.

It might be a commendable act, if the ditch company were able, for it to make a gift of its easements in Graves Avenue to the town of Arvada and the county of Jefferson, but it is difficult to see why it should surrender a valuable open ditch to Davis, a private citizen, without compensation and accept a substituted buried pipe therefor, with the burden of maintaining the same and replacing it whenever necessary. If those gifts affected every stockholder to the same extent, then, by

unanimous consent of all the stockholders, such a gift might be made even to the private citizen Davis, but the same would be very unusual; and, if but one stockholder should object to the making of such a gift, we know of no authority by which the trustee company could persist therein and thus dispose of the property or interest of its *cestui que trust* without his consent. However, in the light of the evidence in this case, those changes do not injuriously affect any of the stockholders, except the plaintiff, and his vested rights seem to have been inequitably and needlessly sacrificed. The stockholders are the real parties in interest in the affairs and property of the corporation, and the corporation, by operation of law, is under contract with each of its stockholders to hold and manage the property and affairs of the corporation for the objects and purposes for which it was created, and for no other purpose; and every stockholder has the right to insist that this contract shall be complied with.—2 Clark & Marshall, *Private Corporations*, sec. 539; *Rocky Ford, etc., Co. v. Simpson*, 5 Colo. App., 31-35. It is not necessary to the enforcement of this right that the officers of the corporation intentionally commit a wrong or an actual fraud, for, if it is shown that the officers are diverting the assets or countenancing any unauthorized surrender of the rights of the corporation, any stockholder has the right to complain and be relieved in equity.—2 Clark & Marshall, *supra*, sec. 539.

If the officers of The Wadsworth Ditch Company, or a majority of its stockholders, may, without compensation, permit Davis to destroy that part of the open ditch on his premises and substitute the same with an underground pipe line, which from its very nature is more expensive to maintain than the open ditch, without the beneficiary of the change assuming all obligations of substitution, maintenance and replacement, then we see no reason why such officers or majority stockholders might

not place a like burden on all minority stockholders without their consent.

There is no claim made in the answers filed by the defendants, or otherwise, that the substitution of the pipe line, the lowering of the grade of the road, and the cessation of returning the tail and waste waters to the natural stream from which they were taken through the premises of the plaintiff, as had been done for nearly a half-century, were for the benefit of the ditch company or any stockholder thereof, except Davis, who had neither a legal nor equitable right to such a recognition if the changes or any of them injuriously affected the vested rights of the company or any of its other stockholders.

The evidence clearly shows that the Mining Ditch had been built across Graves Avenue to and upon the land now owned by Stuart and its waters carried there-through and applied to a beneficial use in washing a number of acres of gravel on the premises for placer gold, long before said avenue was established, and that, by reason of said application of the waters to such a beneficial use, The Wadsworth Ditch Company obtained a decree for $3\frac{1}{2}$ cubic feet of water per second, as Priority No. 1 from Clear Creek. Defendants claim in their answers that the Wadsworth Ditch terminates at the east boundary line of the Davis tract, and does not even reach the premises of Stuart. We are unable to see how The Wadsworth Ditch Company could legally secure a decree for said priority based upon said application of water on the Stuart premises, unless the company owned the ditch leading to the point of use, and we know of no authority of the officers or a majority of the stockholders to abandon that part of the ditch that carried said $3\frac{1}{2}$ cubic feet of water per second across the plaintiff's premises to the place of use without his consent.—*Candelaria et al. v. Vallejos et al.*, 13 N. M., 146, 81 Pac., 589; *The Cache La Poudre Irrigating Co. v. The Larimer & Weld Reservoir Co.*, 25 Colo., 144, 53 Pac., 318, 71 Am. St., 123.

It does not seem consistent with the good faith required of a trustee, for the ditch company to destroy or permit to be destroyed the flumes that formerly conducted the waters of its ditch across Graves Avenue, including the tail or waste waters, which seem to have been wasted over the plaintiff's land, or used by him, Nelson and the Hamiltons, and their predecessors in interest ever since the Mining Ditch was constructed. While it may be true that the ditch company is not required to run any waste water, or water in excess of its claimed appropriation, nevertheless, if there is in said ditch at any time any surplus water, any stockholder who may need the same has an equitable right to the use thereof, even though it may exceed his technical allowance measured by his shares of stock; and, if the ditch company, in its endeavor to so shape things as to bring about this changed condition, did make a spillway west of the premises of the plaintiff, and wasted great quantities of water that ran upon neighboring lands, and made a marsh thereof, as testified to by him, when he desired to and could have made beneficial use thereof but for said changes, he certainly had a right to complain. It is common knowledge that those generally using water at the tail end of a ditch usually have the poorest service when the best of faith is exercised, and it is quite usual to take special pains to give them excess water at such times when the same may be in the ditch, to make up for their losses by reason of being subjected to the mercy of all those above them, as it were. If the evidence of the plaintiff truly shows the conditions as they now exist, every water user above him may participate in the waste or excess waters of the ditch, and, before the same reaches his premises, it may be turned out upon the open country through a spill-gate made for that purpose, while, under the old conditions, such waters could have been delivered to his

lands, and used by him or returned to the natural stream from which they were taken, as provided by statute.

The trial court held that it could not render judgment against the ditch company and the county together. It might have rendered separate judgments against each. However, the question thus passed upon by the trial court was not raised by either demurrer or answer. Section 50, Mills' Annotated Code, provides that the defendant may demur for the reason that there is a defect or misjoinder of parties plaintiff or defendant, or that several causes of action have been improperly united, or for divers other reasons. Section 51 provides that the demurrer shall state the specific grounds therefor; and section 52 requires the demurrer to be disposed of before any other pleading in the same cause of action shall be filed, or it will be deemed to have been waived. In this case, all of the defendants introduced their answers with a general demurrer to the effect that the petition does not state facts sufficient to constitute a cause of action, and is ambiguous, uncertain and unintelligible. They then continued, without even paragraphing, except in that of the Hamiltons, with general and special answers, with no apparent intention of immediate hearing on the demurrers. Under the practice in this jurisdiction, such combined demurrers and answers are not authorized by the Code, and such preliminary demurrer by the very words of the Code is waived by the answer, and is such a blemish on the pleading that it should be stricken upon suggestion. A demurrer because the complaint does not state facts sufficient to constitute a cause of action or for want of jurisdiction may be raised at any time, probably *ore tenus*, and it simply burdens the record by making it precede the answer in the same pleading, and should be discouraged. Defect or misjoinder of parties is waived by pleading and going to trial without objection.—*Miller, etc., v. Blake*, 6 Colo., 118-119.

A defect of parties or misjoinder of causes of action is waived if not raised by demurrer or answer.—*Fitzgerald v. Burke*, 14 Colo., 559, 562, 23 Pac., 993; *Great W. M. Co. v. Woodmas of A. M. Co.*, 12 Colo., 46, 20 Pac., 771, 13 Am. St. Rep., 204; *Brahoney v. Denver, etc., Co.*, 14 Colo., 27, 29, 23 Pac., 172; *Melsheimer et al. v. Hommel*, 15 Colo., 475, 477, 24 Pac., 1079; *Keys v. Morrison et al.*, 3 Colo. App., 441, 443, 34 Pac., 259.

Under the pleadings in this case, the waivers above mentioned and the evidence taken, we feel that we are authorized to and should declare the rights of the parties, as none of them have disclaimed interest or attempted to avoid a trial upon the issues made, but, instead, all have encouraged the trial by actively joining therein without objection.

We find under the complaint and evidence introduced that the plaintiff had a vested right in the maintenance of the Wadsworth Ditch across the premises of the defendant Davis, and to maintain his headgates or delivery boxes so as to irrigate his lands substantially as irrigated by him prior to the destruction thereof by said A. L. Davis, and that said Davis had neither a legal nor an equitable right, as against the plaintiff, to destroy said headgates or said ditch, or to substitute a buried pipe therefor, without providing for plaintiff other adequate and satisfactory means for receiving his water from said carrier so that his lands could be advantageously irrigated as prior to said change, or complying with the terms as contained in the proposed agreement submitted by the plaintiff, or without his consent or acquiescence after having full knowledge of the facts.—*Gregory v. Nelson*, 41 Cal., 278; *Johnston v. Hyde*, 32 N. J. Eq., 455; *Dickenson v. Canal Co.*, 15 Bev., 260; *Allen v. San Jose Water Co.*, 92 Cal., 138, 28 Pac., 215, 15 L. R. A., 93.

Neither had The Wadsworth Ditch Company a right

to destroy or permit to be destroyed such open ditch or to permit a substitution of pipes therefor over the protests of the plaintiff until adequate provision was made substantially as required in the proposed agreement submitted by him to the secretary of the ditch company with the request that he have the same properly executed by said A. L. Davis before the destruction of the said open ditch or before any material change was made in the then existing conditions. The answer filed by The Wadsworth Ditch Company is wholly insufficient to justify it in permitting or acquiescing in the burdens that the evidence introduced shows were placed upon the plaintiff by the changes made.

We further find that The Wadsworth Ditch Company is bounden by its trust to deliver to the plaintiff his full proportion of water with practically as little expense and inconvenience to him as would have been necessary if the changes complained of had not been made, and that no enhanced cost of delivery nor any increased burdens of cleaning, maintaining or replacing any substitute that may or might have been made for the open ditch, can legally be placed upon him without his consent; that the county of Jefferson or the town of Arvada has no right, legally or equitably, to disturb or destroy any vested rights the plaintiff may have enjoyed for his flumes or means of conducting his waters across Graves Avenue, without his consent or without proper condemnation and just compensation; nor had The Wadsworth Ditch Company any right or authority to consent to or permit a disturbance of the plaintiff's easements or flumes in or across said Graves Avenue.

The trial court erred in dismissing the action against the defendants A. L. Davis, The Wadsworth Ditch Company, and The Board of County Commissioners of the County of Jefferson. There seems to be no cause of action against the other defendants named in the com-

plaint, viz.: J. C. Nolan, J. F. White, Pearl Nelson, V. H. Hamilton and W. B. Hamilton. The defendant J. C. Nolan seems to have acted as a representative of the town of Arvada, and it would seem that said town rather than he should have been made a party defendant.

The judgment of the trial court in dismissing the action as against said defendants A. L. Davis, The Wadsworth Ditch Company and The Board of County Commissioners of the County of Jefferson is reversed, set aside and held for naught, and the case is hereby remanded with directions to the trial court to exercise a liberal discretion in permitting the pleadings to be amended, if desired, bringing in the town of Arvada as a party defendant, and securing a full trial on the merits, permitting the use of the evidence taken in the former hearing; and it is hereby ordered that the costs legally assessable on this appeal be taxed against said defendants A. L. Davis, The Wadsworth Ditch Company and The Board of County Commissioners of the County of Jefferson, except such costs as may have been added by reason of those defendants against whom the dismissal is sustained being made parties.

Reversed.

[No. 3800.]

NEWSOM v. DEFORD.

LIMITATIONS—Payment of Taxes—Statute Construed. Under the proviso of sec. 4090 of Rev. Stat., the owner of paramount title, in order to stay the course of the statute, must pay the taxes for one or more of the seven years next following the acquisition of color of title by the adverse claimant. Where one holding color of title pays all taxes upon the land for seven successive years, the payment of subsequent taxes by the holder of paramount title is of no avail.

Appeal from Washington District Court. Hon. H. P. BURKE, Judge.

Mr. ISAAC PELTON, for appellant.

Mr. WILLIAM H. WADLEY, for appellee.

KING, J., delivered the opinion of the court.

The defendant, in an action to quiet title to the southwest quarter of section 27, township 2 north, of range 49 west, in Washington County, Colorado, pleaded as his defense the payment by him of all taxes legally assessed upon said land for seven successive years after he acquired title, and that during all such time the land was vacant and unoccupied. The defendant acquired color of title to said land February 6, 1901, by recording his tax deed. Thereafter the following payments of taxes were made by the defendant under such color of title:

On Feb. 4, 1902, the taxes assessed in 1901.

On Mar. 3, 1903, the taxes assessed in 1902.

On Feb. 26, 1904, the taxes assessed in 1903.

On May 13, 1905, the taxes assessed in 1904.

On Sep. 6, 1906, the taxes assessed in 1905.

On Feb. 30, 1907, the taxes assessed in 1906.

On Feb. 27, 1908, the taxes assessed in 1907.

During all of said time, and thereafter until the beginning of suit, the land was vacant and unoccupied. Plaintiff, having a better paper title to said land than was evidenced by defendant's tax deed, made the following payments of taxes:

On Jan. 6, 1909, the taxes assessed in 1908.

On Jan. 3, 1910, the taxes assessed in 1909.

This suit was commenced February 3, 1910, about nine years after defendant acquired color of title, and one day less than eight years after the first payment of taxes by defendant under such color. The question for determination is whether, under such showing, the payment by plaintiff, on January 6, 1909, of the taxes assessed in 1908, after the defendant had paid all taxes

legally assessed on said vacant and unoccupied land for the term of seven years after he had acquired color of title to said vacant and unoccupied land, arrested the running of the statute of limitations, notwithstanding the fact that suit was not instituted until more than seven full years after the first payment of taxes by defendant. Our conclusion is that such payment of taxes, alone, by plaintiff did not toll the statute. Section 4090, Revised Statutes 1908, section 4656, Mills' Annotated Statutes 1912, provides:

“Whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title.
* * * *Provided, however,* If any person, having a better paper title to said vacant and unoccupied land, shall during the said term of seven years, pay the taxes assessed on said land for any one or more years during the said term of seven years, then and in that case such person seeking title under claim of taxes paid, his heirs and assigns, shall not be entitled to the benefit of this section.”

The evident meaning of the statute is that, in order to toll the statute by the payment of taxes, such payment must be of the taxes assessed on said land for one or more of the years comprised within “the said term of seven years” from and after the date color of title was acquired. Plaintiff did not make such payment. Defendant, under his color of title, had made seven successive payments, constituting the payment of all taxes legally assessed for the term of seven full years after he acquired such color. It was not necessary for him to pay in 1909 the taxes of 1908 in order to establish the bar, as that would be requiring eight years' payment

of taxes instead of seven.—*McConnel v. Konepel*, 46 Ill., 519; *Meacham v. Winstanly*, 77 Ill., 269; *Hurlbut v. Bradford*, 109 Ill., 397. Under the rulings of this court and of the Supreme Court in *Empire R. & C. Co. v. Howell*, 22 Colo. App., 585, 126 Pac., 1096, and *Marks v. Morris*, 54 Colo., 186, 129 Pac., 828, the only way the statute can be arrested after color of title has been acquired and payment of taxes for a term of seven years thereunder has been made, is by the commencement of suit within seven years from the time the first payment under said color was made.

The judgment is affirmed.

Affirmed.

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ABATEMENT.

Prior Action Pending, must be pleaded; or, where there are no formal pleadings, must be raised by proper objection at the trial, or it will be considered as waived.—*Brown's Estate v. Stair*, 140.

APPEALS AND ERROR.

Law of Case. The opinion of the supreme court in a former appeal is the law of the case where the evidence upon the second trial sufficiently approaches that given upon the former trial to make the opinion of the supreme court controlling.—*German American Co. v. Messenger*, 153.

The construction of a contract by the supreme court, upon a former appeal, and its findings based thereon, are the law of the case in all subsequent proceedings. Contentions once resolved by the supreme court are not to be renewed in this court.—*Mulford v. Central Life Society*, 527.

Effect of an Appeal. A void judgment may be vacated by the court where it appears, though an appeal has been perfected therefrom.—*Scott v. Watkins*, 340.

What May Be Assigned for Error—Errors Waived. Plaintiff, who in the trial below allowed many witnesses to give their opinion as to the ultimate facts upon which the jury are to pass, and elicits from his own witnesses their opinions upon the same question, waives the error.—*Meeker v. Fairfield*, 187.

So where, in an action for negligence, the defendant not only admits irrelevant and incompetent evidence as to the conduct of the defendant after the accident, but gives affirmative evidence upon the same subject, he will not be heard to assign error upon the admission of like evidence over his objection.—*Id.*, 187.

Action in Logan county court. Defendant's application for a change of venue denied. Whereupon defendant answered, and the issues were made up. The trial resulted in a judgment for plaintiff. Defendant appealed to the district court, where his application for a change of venue was allowed, and the cause transferred to the Denver county court. In that court the defendant objected to the assignment of the cause for trial without affording him opportunity "to raise such issues

APPEALS AND ERROR—Continued.

of law and fact as he might be advised," claiming that all proceedings in the Logan county court, after the denial of his application for the change of venue, were *coram non judice*, and void. But he failed to tender any pleadings in lieu of those upon file, or ask for time to present such substitute pleadings, or make it appear what issues he proposed to present; moreover, the cause being set down for trial, he participated therein, making no further objection. *Held* that to reverse the judgment, simply to reform the issues and afford defendant a third trial, would be a violation of the provisions of sec. 84 of the code.—*Church v. Myers*, 318.

Appellant is bound by the theory of the case which his counsel advocated below.

A party will not be heard to assign error upon the instructions which he himself prayed in the trial court.—*Mutual Co. v. Good*, 204.

The exclusion of a competent witness offered to establish material matter is error, even though another witness testifies to the same matter. It will not be assumed that the witness excluded would have merely corroborated the one examined. It might well be that he would have remembered some things which had escaped the memory of the other.—*Fagan v. Troutman*, 251.

Manner of Assigning Error. That "the verdict and judgment are against the law, and the evidence insufficient to support the verdict," is not a sufficient assignment of error to admit the contention that the verdict was the result of passion and prejudice animating the jury.—*Colorado Etc. Co. v. Jenkins*, 348.

Harmless Error. Trial by the court. The admission of incompetent evidence held not prejudicial.—*Rollins v. Fearnley Co.*, 85.

Generally one will not be heard to complain of an error which is to his profit.—*Tate v. Holly*, 218.

An erroneous view of the law in the court below, in no manner operating to the prejudice of the appellant, will not reverse.—*Fagan v. Troutman*, 251.

Formal defects in the complaint which might be remedied by motion in the court below will not be held fatal on appeal where it does not appear that the defect could have prejudiced the defendant.—*School District v. High School District*, 510.

Questions Not Presented Below, will not be considered.—*Ryan v. Geigel*, 122.

Objections to instructions which were not called to the attention of the trial court will be disregarded on appeal.—*Tate v. Holly*, 218.

APPEALS AND ERROR—Continued.

In an action involving title to lands, a deed not purporting to describe such lands is of no efficacy and will be disregarded upon appeal, even though the defect was not suggested below.—*House v. Grable*, 405.

Finding Not Supported by Evidence. The trial court, in estimating the plaintiff's damages, accepted and acted upon the testimony of a particular witness, which was not only vague, indefinite, and unsatisfactory, but was opposed to all the other testimony heard. The judgment was reversed.—*Dennis Gibbons Co. v. Rubidge*, 374.

Finding on Sufficient Evidence, Though Conflicting, will not be disturbed.—*Rollins v. Fearnley Co.*, 85; *Ryan v. Geigel*, 122; *Edwards v. McLaughlin*, 202; *Tate v. Holly*, 218.

The verdict or finding below is conclusive in the court of review, unless clearly against the evidence, or the result of passion or prejudice.—*Springer v. Puckett*, 547.

Findings of Fact Construed. Action for money lent, the advance being made by the check of plaintiff payable to defendant. On appeal, defendant contended that the court below based its finding entirely upon the check. But the findings expressly stated that "the check corroborates the plaintiff's testimony." This was held to overthrow the appellant's contention.—*Holmes v. Smith*, 88.

Defective Pleadings—Amendment Presumed. Where, upon proper application, in apt time, it would be the duty of the trial court to permit an amendment of the complaint to correspond with the proof, the complaint will, in the court of review, be treated as so amended.—*English Co. v. Hireen*, 199.

Briefs—Errors Not Noticed, are regarded as waived.—*Muntzing v. Harwood*, 292.

An objection to the verdict, first asserted in the brief in reply, is not in time, and will not be considered.—*Colorado Etc. Co. v. Jenkins*, 348.

Judgment. Action to quiet title to lands. Judgment below for plaintiff was reversed, and the cause remanded with directions to enter judgment for defendant, on condition that he pay to plaintiff all taxes, interest and penalties found to be due.—*Jones v. Empire Co.*, 382.

Error being conclusively shown as to the amount awarded to plaintiff, the judgment was reversed, and the cause remanded with directions to the court below to enter judgment for the proper amount.—*Sussex Bank v. Adams*, 414.

In an equity cause the decree for the defendants being found erroneous was reversed, with directions to the court below to exercise a liberal discretion in allowing an amendment of the pleadings, the bring-

APPEALS AND ERROR—Continued.

ing in of a new party, and to receive, upon the second hearing, the evidence taken upon the first.—*Stuart v. Jefferson County*, 568.

APPEALS—COUNTY TO DISTRICT COURT.

Effect. Under sec. 7254 of the Revised Statutes, an appeal lies to the district court from any final determination of law or fact in the county court relating to the administration of any decedent's estate, without interrupting proceedings as to other matters, or submitting to the district court any question as to the administration, or any other question than that, from the determination of which the appeal is prosecuted.—*Miller v. Weston*, 231.

— **Time of Filing Bond.** Under Rev. Stat., sec. 1537, the party defeated in the county court is entitled, without any order of the court, to ten days in which to file an appeal bond. The county court at the time of entering judgment may, on cause shown, allow for this purpose any reasonable time, beyond ten days; and, in the absence of any objection made at the time, it will be assumed in the court of review that the order was made on proper showing.—*Wellmuth v. Rogers*, 386.

An order extending the time for filing the bond, made without notice to the successful party, is void.—*Id.*

So of an order made after the lapse of the time originally prescribed.—*Id.*

ASSUMPSIT.

Money Had and Received—Where the Action Lies. Where the party sought to be charged has actually received, or had the benefit of, money of the other, for which, in equity and good conscience, he ought to account, *e. g.*, where a corporation has actually received and appropriated money borrowed by its agent without authority.—*English Co. v. Hireen*, 199.

Waiving Tort. Brown and Stair were employed as attorneys for a client who had removed to another state. Brown having obtained from Stair authority to settle the fees of the two visited the client at her new place of residence, and, though the fee was payable in cash, took from her a conveyance to himself of lands valued at \$4,000.00, giving the client his receipt for \$3,500.00 in full of his fees, and the like receipt of Stair for \$500.00. In fact, Brown had been employed at the instance of Stair, and with the agreement that the fee should be equally divided. **Held** that Stair was entitled to sue in equity for the undivided one-half of the lands, or, waiving the tort, to sue for the value of one-half of the land; and that Brown, having departed this life, Stair might assert against his estate a claim of the same character.—*Brown's Estate v. Stair*, 140.

BAIL.

Recognizance. Defined.—*Tanquary v. People*, 534.

Conditions Not Specified in the Statute, are not binding upon the surety. The condition that the principal "abide the order of the court" is of this character. Rev. Stat., sec. 1947.—*Tanquary v. People*, 531.

Remedies. Either *sci fa.*, or an action of debt lies.—*Id.*

Forfeiture in justice's court, certified to the district court, becomes a record, both of the bond and the forfeiture, having the effect of a judgment.—*Id.*

Forfeiture of Recognizance—Estoppel to Assert. After many continuances a criminal information was stricken from the trial calendar, and the surety of the accused was expressly told by the district attorney that it would never thereafter be called for trial. The district attorney had then power to *nolle* any prosecution, without the consent of the court.

The bail, on the faith of the assurance so given by the district attorney, thereupon surrendered to the accused certain collateral which he had received, to indemnify him against liability upon the recognizance, and the principal left the state. *Held* that the statement of the district attorney was, in effect, leave to the accused to depart the court, and absent himself until lawfully required to return, and that the state was estopped to declare a forfeiture of the recognizance as against the surety.—*Id.* *Haney v. People*, 12 Colo., 345, distinguished.

The effect of such a stipulation of the district attorney, since the adoption of c. 73, Laws 1913, not decided.—*Id.*, 531.

BANK CHECKS.

Presentation for Payment. There is no hard and fast rule as to when a check must be presented for payment. It must be presented within a reasonable time, which depends on the situation of the parties with reference to one another, and to the bank, as well as all other material facts and circumstances attending the transaction.

The cashier of a bank was also treasurer of a municipal corporation. In the latter capacity he received from the city clerk a check drawn upon the same bank. Knowing that the bank was in failing condition he omitted to present the check on the day of its receipt, alleging as an excuse that he "did not have time," and, on the next secular day, the bank closed its doors. *Held* he was derelict in failing to present the check on the day upon which it came to him.—*Babcock v. Rocky Ford*, 313.

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See *FRATERNAL SOCIETIES*.

BILL OF EXCEPTIONS.

When Necessary. The proof of death and petition for letters testamentary or of administration upon the estate of a deceased person are part of the pleadings.—*Miller v. Weston*, 231, 238.

And a caveat against the probate of a will is a pleading of the contestor.—*Id.*, 239.

Time of Filing. There is no limit of time within which the bill of exceptions must be filed with the clerk. If certified by the clerk to the court of review, as part of the transcript, this is sufficient evidence of its timely filing. That it bears a file mark as of a day antecedent to its authentication by the judge is unimportant.—*Tate v. Holly*, 218.

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Haney v. People, 12 Colo., 345, explained.—*Tanquary v. People*, 538.

CITIES.

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CLOUD UPON TITLE.

Lease. A lease of lands, and the water rights appurtenant thereto, for a term of forty years, assumed to authorize the lessee, at his option, to prospect the land for oil and gas, to construct and maintain machinery, pipe lines, railroads and buildings, to sub-let any part or all of the premises, and to transfer all rights acquired thereunder. No consideration was paid for the lease, and the lessee was not under duty to do anything whatever in the way of development or improvement. *Held* that the paper must be construed as a mere option, and the lessee, having done nothing whatever towards the exploration or development of the land during the whole period of almost eighteen months from the date of the lease to the day of trial, and no evidence being given of any intention on his part to at any time do anything, the lease was held a cloud upon the owner's title and canceled.—*Davis v. Riddle*, 162.

CONSTITUTIONAL LAW.

Imprisonment for Debt. Sec. 12 of art. II of the constitution is not self-executory.—*Coryell v. Lawson*, 432.

Title of Statute. The title of the act of April 23, 1909 (Laws 1909, c. 202), contains but one subject, and its incidents, and is not a violation of sec. 21 of art. V of the constitution.—*School District v. High School District*, 510.

Judgment of Another State. The judgment of a court of another state, having jurisdiction, is conclusive upon the merits. The defendant will not be heard to deny its obligation, nor to impeach it for fraud in

CONSTITUTIONAL LAW—Continued.

obtaining it, save in cases where the court in which the judgment was given, would, itself, allow the defense, in an action upon the judgment.—*Bonfils v. Gillespie*, 496.

CONTRACTS.

What Is a Contract. Assurance given by the manager of a corporation to one of its employes that the corporation will be in funds and pay his wages creates no personal liability against the manager.—*Anderson v. Bailey*, 175.

Assent. To a valid contract mutual assent is necessary.—*Grogan v. Travelers' Co.*, 517.

As the expiration of a life policy approached, the local agent of the insurer not being able to communicate with the assured forwarded to the insurer company, from her own funds, the premium required for the renewal of the policy, and transmitted to the assured the renewal receipt. The assured, later, being informed by the agent of the advance which she had made, wrote expressing his regret at the course taken, declaring that he had not intended to renew, declining to repay the advance, and promising to return the renewal receipt, on his return from a journey upon which he was then absent from home. During this journey he came to his death. The insurer company being informed of the facts cancelled the policy. *Held* there was no meeting of minds upon the proposed renewal of the policy and that the beneficiary therein was not entitled to an action.—*Id.*, 517.

Validity—Agreement to Do What Is Lawful, though with a sinister purpose, is not unlawful, nor is what is done, pursuant to such agreement, void.—*Watkins v. Perry*, 425.

Consideration. Offer of the soil of a lot, and a promise from the one to whom the offer is made to remove it. There was no understanding that the soil, or the value of it, was offered, considered, or accepted as a consideration for the promise to remove. *Held* that the engagement was gratuitous, and the promise to remove without consideration, and imposed no obligation or liability. The damage resulting from the failure to remove the soil was no consideration for the promise to remove it.

Nor was the permission of the land-owner to the other to enter, or the surrender of possession for the purpose of affecting the removal.—*Denver Co. v. LeFevre*, 304.

Ratification. Where to the effectual execution of a contract by a municipal corporation, particular solemnities are required, the same solemnities are necessary to its ratification.—*Colorado Springs v. Coray*, 460.

CONTRACTS—Continued.

Law of Place. The law of the place where the contract is made controls as to its validity and the capacity of parties; the law of the place of performance, with reference to all questions concerning performance, whether the action is brought at the place of performance or elsewhere; and the law of the forum as to all questions concerning the remedy.

The capacity of a corporation is determined by the law of its creation, but may be restricted or encumbered with conditions by the statute of another state where it attempts to contract.

When the capacity or authority of an agent, executor, or administrator is in question, the law of the state or country where the relation was created necessarily enters as a factor.

But even though the party making the contract was capable thereto, it may still be unenforcible, because it calls for the performance of acts, to which, according to the law of the place of performance, such person is incompetent.

A foreign corporation doing business in Colorado fails to file with the secretary of state a copy of its charter as required by statute. A promissory note executed by such corporation in Colorado, but payable in another state, charges the officers of the corporation, under Rev. Stat., sec. 919.—*Cockburn v. Kinsley*, 89.

Penalty or Liquidated Damages. Appellee's assignor rented premises of the defendant for a term of years. The lessee gave a bond of \$3,000.00, with surety, to guarantee performance of the lease. Five thousand dollars, evidenced by a promissory note secured by a deed of trust, was deposited with the lessor, to be considered as a loan for the period of the lease, but provision was made that if the lease should be forfeited the note and deed of trust should be canceled. At the end of six months the assignee abandoned the premises and the landlord entered, taking entire control. *Held*, following *Carson v. Arvantes*, 27 Colo., 81, it was not necessary to determine whether the deposit made by the lessee constituted liquidated damages or a penalty.—*Wilson v. Agnew*, 109.

Construed. A receipt for money as part of the purchase price of lands described, bearing the signature of the vendors only, *held* a mere option.—*Hessell v. Neal*, 300.

The holder of a certificate of purchase under a mortgage sale from which no redemption was made within the statutory period entered into an agreement with the mortgagor to convey the lands to him, upon certain conditions. The contract construed and held to be, as upon its face it imported, a contract of sale; and, not being in any part performed, it was held to confer no right.—*Ross v. Nichols*, 409.

CONTRACTS—Continued.

Plaintiff, the owner of certain water works, proposed to the City of Pueblo to purchase its plant, "said city to assume the outstanding bonded indebtedness," the amount of which was specified, the city council to accept the proposition "by resolution, thereupon the same shall become a binding contract * * * subject only to approval by a vote * * * at a special election called for that purpose." The city, by resolution, accepted the proposition, with the same proviso. An election was thereupon called and held pursuant to the provisions of the statute (Rev. Stat., secs. 6803-6816); the proposition was approved, and the transaction was concluded, and a deed executed, some three months after the acceptance of the proposition by the city. Meantime, interest had accrued upon the bonded indebtedness, and it was claimed by plaintiff that by the resolution of the city council accepting the proposition of sale, the city became the equitable owner of the plant and was therefore subject to the ordinary incidents and burdens of that relation, and liable for the interest subsequently accruing upon the bonded indebtedness. *Held* that the proposition of sale, and the acceptance thereof, were preliminary and provisional merely, made in contemplation of the provisions of the statute under which the matter was submitted to the people, that the provisions of the statute entered into and became part of the project, that nothing was or could be concluded until these were complied with, and that no title, legal or equitable, passed to the city until the conveyance was executed and possession delivered; that, therefore, defendant was not liable for interest accruing prior to such conveyance and delivery.—*Pueblo Co. v. Pueblo*, 554.

CONVEYANCES.

Acknowledgment in Another State. A conveyance of land situate in Colorado, executed in another state, may be acknowledged before any of the officers named in the statute (Rev. Stat., sec. 684). If acknowledged before any other officer, the certificate of acknowledgment must be accompanied by the certificate of the clerk of some court of record, under the seal of the court, affirmatively showing that by the laws of such other state such officer is authorized to take and certify such acknowledgment. The statement need not be in the language of our statute, but must be a clear and unequivocal statement of such authority. No presumption to support it will be indulged.—*McKibbin v. Paul*, 134.

The mere statement in the certificate "that full effect and credit ought to be given" to the acts of the officer certifying the acknowledgment is not a compliance with the statute.—*Id.*

CORPORATIONS.

Powers and Capacities. The capacity of a corporation is determined by the law of its creation, but may be restricted or encumbered with

CORPORATIONS—Continued.

conditions by the statute of another state where it attempts to contract.—*Cockburn v. Kinsley*, 89.

Right of Stockholder. The corporation, by operation of law, contracts with its stockholders to manage the corporate property for their benefit, and to promote the purposes for which the corporation was formed, and those only. Every stockholder has the right to insist that this contract shall be complied with.—*Stuart v. Commissioners of Jefferson County*, 576.

Liability of Directors for the Debts of the Corporations—Statute Construed. This statute making the directors of a corporation liable for its debts in case of failure to file the annual report (Rev. Stat., sec. 911) is penal in character and to be strictly construed. The liability of the directors attaches after sixty days from January 1st, and the "preceding year," for the debts contracted during which the directors become personally liable, dates from the sixtieth day after January 1st, and extends back twelve months from the date of their default.—*Bovee v. Boyle*, 165.

Not every liability can be made the basis of an action against the directors, *e. g.*, liabilities asserted by reason of a tort of the corporation, or a judgment founded upon such tort.—*Id.*

Evidence of Domicile. A treasurer's deed to a corporation described it as of a county named "in the state of New Jersey." The name not bearing the definite article prefixed, as required by our statute (Rev. Stat., sec. 846), these circumstances were accepted as evidence of its foreign origin.—*Austin v. King*, 363.

Foreign—Liability of Officers and Members. A foreign corporation doing business in Colorado fails to file with the secretary of state a copy of its charter as required by statute. A promissory note executed by such corporation in Colorado, but payable in another state, charges the officers of the corporation, under Rev. Stat., sec. 919.—*Cockburn v. Kinsley*, 89.

The statute requiring every foreign corporation doing business in Colorado to file with the secretary of state a copy of its charter, and imposing upon the officials and members of such corporation personal liability upon all contracts of the corporation made within this state (Rev. Stat., secs. 916, 919), was intended primarily for the protection of our own citizens, and applies only to such foreign corporations as engage in the general prosecution here of the business for which they were incorporated.

A single transaction is not "doing business," and the phrase does not include the mere sale of shares, measures taken for promoting the

CORPORATIONS—Continued.

affairs of the corporation, or meetings of the directors for such purposes only.

A corporation organized under the laws of Arizona was operating a mine located in the republic of Mexico. The directors of the corporation resided in Colorado Springs, and the superintendent of the mine corresponded with them in reference to his operations. Certain shares of stock had been sold at Colorado Springs by correspondence with a party in Chicago. The treasurer, of his own motion, had caused letterheads to be printed, designating a certain office in Colorado Springs as the main office of the company. The corporation owned no property in Colorado, and, save to execute one promissory note evidencing the loan of money, had never done any business within the limits of Colorado. In an action upon this note against the officers of the corporation, under Rev. Stat., secs. 916, 919, *held* that the corporation had not "been doing business" within the meaning of the statute.—*Cockburn v. Kinsley*, 89.

Foreign—Service of Process Upon. A foreign corporation which was named as defendant in an action brought in Kit Carson county to quiet the title to the lands situate in that county had filed with the secretary of state a certificate designating one R as its agent upon whom process should be served. No such certificate had been filed in the office of the county clerk of Arapahoe county, where service was made, and it was contended that under sec. 38 of Mills' code (Rev. Code, sec. 40) this service was insufficient. In view of the provisions of Mills' Code, sec. 39 (Rev. Code, sec. 43), Mills' Stat., sec. 499 (Rev. Stat., sec. 917), Mills' Stat., sec. 506 (Rev. Stat., sec. 856), and sec. 10 of article XV of the constitution, it was *held* that the action was properly brought in the county of Kit Carson, and that the service was sufficient to sustain the decree against the collateral attack.—*Austin v. King*, 363.

COUNTIES.

Liability for Attorney's Bill. The bill of an attorney for services rendered in an election contest instituted to bring in question the election of a county commissioner is not a charge against the county.

In view of sec. 2099, Rev. Stat., an attorney should not be allowed for services rendered to county officials other than the board of county commissioners, unless such other officials are first authorized by the commissioners to employ or consult an attorney.

Under Rev. Stat., sec. 1241 and sec. 2096, the county commissioners are authorized to employ one or more attorneys on behalf of the county, and their action in the matter will not be reviewed by the court unless it is made to appear that they acted unlawfully and corruptly.—*Morris v. Adams County*, 416.

COUNTY COMMISSIONERS.

Action Without Meeting. The services of an attorney for the county being necessary, his employment by a majority of the board, without meeting, may be afterwards ratified at a meeting duly held.—*Morris v. Adams County*, 416.

Bond—Liability—Statute Construed. The statute (Rev. Stat., sec. 1251) providing that "any member of a board of commissioners who knowingly acquiesces in any misappropriation of the funds of a county, or in the allowance of bills which are not legally allowable," held that a mere mistake of judgment gives no action upon the bond, but that tortious or fraudulent conduct, with knowledge of the improper character of the charge allowed, must be shown.

Held, further, that the statute is not to be construed as a penal statute, and that, construing the statute as giving a penalty, the action being instituted more than one year after the offense was barred by Rev. Stat., sec. 4068.—*Morris v. Adams County*, 416.

Section 1219 of the Revised Statutes provides that no account shall be allowed by the Board of County Commissioners unless "made out in separate items, and the nature of each item stated." Sec. 1251 declares that any member of a board of county commissioners who knowingly acquiesces in any misappropriation of the funds of a county * * * or the allowance of bills "which are not legally allowable * * * shall be liable upon his bond for all damages, both proximate and remote." In an action upon a county commissioner's bond it was held in the court below that consent to the allowance of a bill not itemized as required by the section first quoted, rendered the commissioner and his sureties absolutely liable, no matter how just the claim might be. This construction of the statute rejected, and held that such an interpretation of sec. 1219 would necessarily render sec. 1251 highly penal in character, contrary to what was resolved in *Morris v. Board of Commissioners*, ante 416.—*Nordloh v. Adams County*, 457.

COUNTY COURT.

Jurisdiction. The county court has jurisdiction to allow against an intestate's estate a claim as for money had and received founded upon a purchase of land by the intestate, in his own name, with funds of the claimant.—*Brown's State v. Stair*, 140.

Presumptions. The county court, in the administration of the estate of deceased persons, is a court of general and unlimited jurisdiction.

It acquires jurisdiction of a particular estate by proof of the death, and petition for letters of administration thereon, or letters testamentary.

COUNTY COURT—Continued.

The question of the residence of the decedent is a question of fact, to be determined by the evidence, and, nothing appearing to the contrary in the record, it will be presumed that the court examined and determined the question in favor of its jurisdiction.

The jurisdiction, once acquired, continues until lawfully divested, and this without regard to the probate of an alleged will of the decedent, which is but one incident of the jurisdiction of the subject matter.—*Miller v. Weston*, 231.

Objections to the Jurisdiction—Time of. The provisions of Rev. Stat., sec. 7102, that administration of the estate of every decedent shall be had in the county court of his last known residence is mandatory; but it may nevertheless be waived. The county court of Park having assumed jurisdiction of the probate of the will of a decedent, a contestant appeared, filed a *caveat* denying the authenticity of the will, and alleging the invalidity thereof upon various grounds; and, without any mistake or inadvertence, proceeded to the trial of the issues joined upon his *caveat*, without objecting in any manner to the jurisdiction of the court. *Held* that he thereby waived all objection to the jurisdiction of the court upon the ground that the county of Park was not the county of the last known residence of the deceased.—*Id.*

DAMAGES.

Measure—Breach of Warranty of Personal Property. In an action for the breach of a warranty of personal property, after payment of but part of the purchase price, plaintiff recovers the amount paid; and where return of the thing sold has been tendered to the seller, moneys reasonably expended in the care and keep of the property subsequent to said tender.—*Springer v. Puckett*, 547.

Evidence. Action for personal injuries. The complaint alleged that plaintiff at the time of the injury was engaged in mining, merchandising, ranching, and banking. Evidence that for many years plaintiff had been in receipt of a salary named was held admissible.—*Colorado Etc. Co. v. Jenkins*, 348.

Exemplary. Under Rev. Stat., sec. 2067, an award of exemplary damages for a wrong to the person may be upheld if the defendant inflicted the injury in wanton and reckless disregard of plaintiff's rights, though malice was entirely wanting.—*Coryell v. Lawson*, 432.

Excessive—Remittitur. Action for personal injury. Damages awarded in \$5,100. Order that plaintiff remit \$1,100, or submit to a new trial. Remittitur accordingly, and judgment for the residue. Affirmed on appeal.—*Colorado Etc. Co. v. Jenkins*, 348.

DAMAGES—Continued.

Personal Injury. An award of \$5,000 for an injury to a man of 45 years, actively engaged in business, the injury resulting in a permanent impairment of the use of an arm, is not excessive.—*Id.*

The award of \$3,500 for the death of plaintiff's husband *held not* excessive, in view of the testimony as to his age, exemplary habits, and earning capacity.—*National Co. v. Maccia*, 441.

Duty of Plaintiff to Minimize. The landlord is not under duty to relet the premises when the tenant has abandoned them in violation of the terms of the letting. He may recover the stipulated rental, though he suffers them to remain vacant.—*Wilson v. Agnew*, 109.

DECEIT.

Unqualified Statement as to Which Party Making It Has No Knowledge. A positive statement of matter of fact, susceptible of knowledge, implies an affirmation of knowledge on the part of the one making the statement. If he has no knowledge as to the matter, he is guilty of actual fraud.—*Plank v. Maxwell*, 158.

DEEDS.

See **CONVEYANCES**.

DEED OF TRUST.

Trustee's Deed, executed without any public sale, as required by the power contained in the deed of trust, is void.—*Stratton v. Murray*, 395.

Purchaser's Duty—Caveat Emptor, applies strictly to a purchase at a trustee's sale. The purchaser must, at his peril, see that the trustee follows the requirements of the power of sale.—*Id.*, 395.

DESCENTS.

Legislative Power. The legislature might have conferred the right of inheritance upon stepchildren.—*Fagan v. Troutman*, 268.

DISTRICT COURT.

Jurisdiction. Where a cause of which the district court would have had original jurisdiction is brought to it by appeal from the county court, and the parties proceed to trial without objection predicated upon the absence of jurisdiction in the county court, all defects in the jurisdiction of the county court are waived.—*Brown's Estate v. Stair*, 140.

Sections 6000, 6006, of the Revised Statutes do not confer exclusive jurisdiction upon school district boards, or the superintendent of education, to decide all controversies to which a school district may be party. Under Rev. Stat., sec. 6007, wherever a money judgment is demanded resort must be had to the courts, and the district court may entertain the action.—*School District v. High School District*, 510.

EJECTMENT.

Evidence. Plaintiff relies upon his own title, and must establish it by proof.—*Goerke v. Manitou*, 482.

EMINENT DOMAIN.

Title Acquired—Effect of Abandonment. Where, in condemnation proceedings, the final order, under Rev. Stat., sec. 2420, authorizes the petitioner to take hold, etc., the premises described, "for railroad purposes," a mere easement or terminable fee is acquired. When the land is no longer used for the public purpose specified, the right so conferred reverts to the former owner, or his successor in interest.—*Lithgow v. Pearson*, 70.

The provision of Rev. Stat., sec. 2431, that the owner shall receive "the full and actual value," does not affect the result.—*Id.*, 70.

EQUITY.

Laches—Bill to Quiet Title. The defendant had made no improvement upon the land nor done any act in respect to it, by reason of plaintiff's failure to bring his action at an earlier day. Held he was not in position to complain of the delay.—*Parks v. Roth*, 296.

ESTOPPEL.

By Conduct. After many continuances a criminal information was stricken from the trial calendar, and the surety of the accused was expressly told by the district attorney that it would never thereafter be called for trial. The district attorney had then power to *nolle* any prosecution, without the consent of the court.

The bail, on the faith of the assurance so given by the district attorney, thereupon surrendered to the accused certain collateral which he had received, to indemnify him against liability upon the recognizance, and the principal left the state. Held that the statement of the district attorney was, in effect, leave to the accused to depart the court, and absent himself until lawfully required to return, and that the state was estopped to declare a forfeiture of the recognizance as against the surety. *Haney v. People*, 12 Colo., 345, distinguished.—*Tanquary v. People*, 531.

Ejectment. Defendant pleaded title under a tax deed recorded in 1899, and continued possession thereafter. He also pleaded a tax deed acquired under a tax sale made in 1903, for the tax of 1902, and, the latter deed being unassailable, defendant prevailed thereon. On appeal, plaintiff contended that defendant, being, by his own admissions, in possession when the tax of 1902 accrued, was under duty to pay it, and his purchase at the tax sale, so occasioned by his own wrong, must be construed as a payment of the tax. But the tax deed first pleaded by

ESTOPPEL—Continued.

the defendant had been excluded by the court, upon plaintiff's objection, defendant's possession thereafter was denied, and there was no evidence of such possession. *Held* that plaintiff was not to be heard to set up, as the foundation of the estoppel asserted, defendant's allegations of a title which he had himself excluded.—*Scott v. Ramseier*, 540.

EVIDENCE.

Judicial Notice—Decisions of Foreign Courts. Where the law of another state is in question, the decisions of the highest court of such state will be judicially noticed.—*Baxter v. Beckwith*, 322.

In an action upon a judgment rendered in another state the court will invoke the decisions of the court of final resort of that state as to the rules of pleading which there obtain.—*Bonfils v. Gillespie*, 496.

Presumptions. There is no presumption that those who assume to convey lands as the heirs of a decedent are, in fact, such heirs. Whoever claims under the conveyance has the burden of establishing their character as such.—*Lithgow v. Pearson*, 70.

There is no presumption of law that the statutes of another state regulating the practice of the courts are identical with those of this state.—*Bonfils v. Gillespie*, 496.

Burden of Proof. Whoever assails the validity of a decree of a court of record has the burden of proof.—*Brown v. Whetstone*, 371.

Where, defending the servant's action for negligence, the master alleges contributory negligence of servant, he has the burden of proof.—*National Co. v. Maccia*, 441.

Whoever relies upon the action of a board or tribunal of special and limited jurisdiction has the burden of establishing the regularity of the proceeding.—*Goerke v. Manitou*, 482.

Whoever asserts that a particular person is descended from another has the burden of proof.—*Mutual Life Co. v. Good*, 204.

The assured in a life policy was born out of wedlock. The sister of his mother testified that a man named was his father. *Held* mere opinion, and not evidence.—*Id.*, 204.

Hearsay is admissible, but is to be received with caution.—*Id.*, 204.

Action upon an insurance policy upon the life of one Good. The defendant attempted to show that the assured was, in fact, the son of one Rist, who died of pulmonary consumption, contrary to the declarations of the assured in his application. Verdict for the plaintiff. The evidence being examined, the court declined to set aside the verdict.—*Id.*, 204.

The evidence examined and held sufficient to show that certain per-

EVIDENCE—Continued.

sons named were the sole heirs of certain deceased persons—the action being a bill to quiet title, and the defendant showing no right.—*Muntzing v. Harwood*, 292.

Parol Not Admissible. Parol evidence is not admissible to enlarge the liability of the lessee for damages not mentioned in the lease.—*Wilson v. Agnew*, 109.

Admissions—In Pleading. In an action upon the judgment of the court of another state, the admission that such court is a court of record, the service of process, and appearance, and the non-payment of the judgment disposes of all questions as to the existence of the judgment unsatisfied, and the jurisdiction of the court, both as to the person and subject matter.—*Bonfils v. Gillespie*, 496.

Ejectment. Defendant pleaded title under a tax deed recorded in 1899, and continued possession thereafter. He also pleaded a tax deed acquired under a tax sale made in 1903, for the tax of 1902, and, the latter deed being unassailable, defendant prevailed thereon. On appeal, plaintiff contended that defendant, being, by his own admissions, in possession when the tax of 1902 accrued, was under duty to pay it, and his purchase at the tax sale, so occasioned by his own wrong, must be construed as a payment of the tax. But the tax deed first pleaded by the defendant had been excluded by the court, upon plaintiff's objection, defendant's possession thereafter was denied, and there was no evidence of such possession. *Held* that plaintiff was not to be heard to set up, as the foundation of the estoppel asserted, defendant's allegations of a title which he had himself excluded.—*Scott v. Ramseier*, 540.

Admission by Objections to Testimony. Deed executed by the heirs of a decedent, the former proprietor. Objection, "It requires more than a showing that a person died intestate to entitle the heirs to convey." Held to admit the intestacy of the decedent named in the deed.—*Muntzing v. Harwood*, 292.

Opinions as to the Ultimate Facts, which are for the jury only, are inadmissible unless the witness is a qualified expert, or his testimony involves a description, estimate of magnitude, velocity, value, or the like, or from the nature of the subject of inquiry it is impossible or difficult to state in detail the facts and their surroundings with such exactness as to produce in the minds of the jury the impression which personal observation has produced in the mind of the witness. Cases upon the subject examined.—*Meeker v. Fairfield*, 187.

Objections to Evidence. Where a writing offered in evidence is objected to, upon grounds which go to the whole of the document, and counsel for the party, in making the offer, is of the opinion that as to

EVIDENCE—Continued.

some part the paper is admissible, it is his duty to indicate this to the judge presiding, and, if he fail in this duty, he is not at liberty to afterwards assign error upon ruling of the court excluding the whole document.—*Mutual Co. v. Good*, 204.

Corroborating Witness—Frame of Question. Action for the death of plaintiff's husband attributed to defendant's negligence. A boy examined for defendant gave testimony tending to show contributory negligence on the part of the deceased. On cross-examination certain favors extended by defendant to the parents of the witness were shown. Another witness was asked, by way of corroboration of the boy, whether "*after the accident*" the boy made a statement in reference to the occurrence. *Held* that inasmuch as it did not appear, and no attempt was made to show, that the statement, whatever it was, antedated the receipt of the favors by the boy's parents, it was properly excluded.—*National Co. v. Maccia*, 441.

Credibility of Witness, is for the jury. Their determination will not be reviewed upon appeal.—*National Co. v. Maccia*, 441.

Deposition—Effect on Appeal. The verdict of the jury is not conclusive in the court of review as to the veracity of a witness who testifies by deposition.—*Germania Co. v. Klein*, 326.

EXECUTIONS.

Against the Body—Verdict. Action for an assault and battery. The jury found defendant guilty, awarded exemplary damages, and declared the defendant "guilty of evil intent," not expressly declaring that such evil intent existed in the commission of the tort. *Held* that an order for the arrest and commitment of the defendant was unwarranted. The statute (Rev. Stat., secs. 3024, 3025) requires that the jury should state in their verdict that "in committing the tort" the defendant was "guilty of malice," etc.; and the court is not warranted in reading into the verdict a statement of fact which the statute requires from the jury itself.

Held further, that in view of Rev. Stat., sec. 2067, the award of exemplary damages was without effect to enlarge the finding of evil intent.—*Coryell v. Lawson*, 432.

EXECUTORS AND ADMINISTRATORS.

Exhibition of Claims. Under Rev. Stat., sec. 7212, formal pleadings are not required in presenting a claim against a decedent's estate.

A claim was presented in the following words:

"Estate of C. C. Brown, deceased, to Gobin Stair, Dr., April 1, '08.

EXECUTORS AND ADMINISTRATORS—Continued.

That C. C. Brown held in trust and converted the sum of two thousand dollars belonging to Gobin Stair.....\$2,000
 Credit—Paid on above account..... 500

Balance\$1,500"

Held sufficient. But the court note that it appeared beyond controversy that the administratrix had long known of the claim, and, in a general way, of the facts upon which it was based, and could not have been misled by the manner in which it was presented.—*Brown's Estate v. Stair*, 140.

Exhibition of claim to administrator is not required under Rev. Stat., secs. 7210, 7211, to avoid the bar of the statute of limitations. It is sufficient if the claim is filed within one year from the granting of letters.—*Brown's Estate v. Stair*, 140.

Sale of Lands—Purchase by Administrator's Attorney—Conspiracy. The attorney of the administrator purchased lands at the administrator's sale. Less than two years afterwards he conveyed to the administrator. The heirs, suing to vacate the sale and subsequent conveyances, contended that the sale to the attorney was the result of a conspiracy to enable the administrator to evade the statute (Rev. Stat., sec. 7183). Judgment below for defendant.

The evidence examined and held not sufficiently clear and conclusive to require the court to vacate the judgment of the court below, where the judge presiding had the advantage of observing the demeanor of the witnesses in giving testimony.—*Ryan v. Geigel*, 122.

FAMILY.

Stepchildren, taken into the family, treated and fostered as children of the whole blood, are considered members of the family, and entitled to support from the stepfather; but do not inherit from him.—*Fagan v. Troutman*, 251.

FIRE INSURANCE.

Construction of Policy. A contract of insurance against fire is one of indemnity; it will be given the construction most in accord with the natural and probable intent of the parties.—*German American Co. v. Messenger*, 153.

FRATERNAL SOCIETIES.

Knowledge of Falsity of Representations in Application for Membership. Action upon the insurance clause of a certificate of membership. It was clearly made to appear that the statements of the mem-

FRATERNAL SOCIETIES—Continued.

ber, in his application, as to his habits in the matter of the use of intoxicating liquors, were false. But it appeared that, before accepting the application, one Hume, who it was contended was the representative of the society, had been expressly told that the applicant would not be a desirable member, that "he drank too heavily." Another witness, an intimate friend and associate of the member, had said to Hume, in speaking of the member, some two weeks after the occurrence, that "he would not write him up * * * that he was too much of a drinker." The plaintiffs contended upon this that the society were fully informed of the falsity of the statements of the applicant, before accepting his application, had accepted membership fee and expenses with such knowledge, and were therefore estopped to deny liability. *Held* that the statements of the witnesses relied upon were not necessarily conflicting with the statements of the application; that neither of the witnesses gave any idea of the amount or quality of intoxicating liquors consumed by the member, or how frequently indulged; that their expressions were mere hazy opinions, founded on no facts disclosed in the record, and that the society was not under duty to pursue an investigation beyond the medical examination.—*Modern Woodmen v. International Co.*, 26.

FRAUD.

See DECEIT.

GUARANTY.

Guarantor or Original Contractor. Action against two as original contractor. The evidence examined and held to show incontestably that one defendant was a mere guarantor.—*Anderson v. Dailey*, 175.

HIGHWAYS.

Proceedings of County Commissioners to Establish—Record. County commissioners in establishing public roads exercise judicial functions and are regarded as courts of special and limited jurisdiction.—*Goerke v. Manitou*, 482.

Whoever relies upon their proceedings as an estoppel or adjudication must show their jurisdiction, both as to the subject matter, and as to the persons whose lands were sought to be appropriated, and must show also the identity of the road.—*Id.*

The proceedings being had under Rev. Stat., 1868, c. 76, and the record failing to show a petition by ten freeholders, the termini of the road, a day appointed for hearing the petition, notice served upon the land owners, that any hearing was had, that the viewers appointed were freeholders, or that the day appointed for their meeting was an-

HIGHWAYS—Continued.

nounced, and there being no evidence to supplement these defects, *held* jurisdiction was not shown.—*Id.*

It appearing that the day fixed for the meeting of the viewers was less than ten days subsequent to their appointment, *held* that the board failed to acquire jurisdiction either as to subject matter or person.—*Id.*

The regularity of the proceeding must appear by the record. No presumptions are indulged.—*Id.*

User. The evidence held to establish a public road by user for the width actually traveled and used.—*Id.*

The provisions of General Stat. 1883, sec. 2953, sec. 3928, Mills' Stat., are not effective to extend a public road established by a mere user, beyond the width actually traveled, nor to apply to such a highway the provisions of Rev. Stat., sec. 5849.—*Id.*

The width of a road so acquired is not to be extended by reference to a void record as color of title.—*Id.*

HIGH SCHOOLS.

See **SCHOOLS.**

HUSBAND AND WIFE.

Conveyances Between. Where the husband pays the purchase money on lands and takes a conveyance to the wife, it is presumed that a gift was intended; whereas, if the purchase money is paid by the wife, and the title conveyed to the husband, a resulting trust is presumed.—*Fagan v. Troutman*, 251.

IMPRISONMENT—For Tort.

See **EXECUTIONS.**

INHERITANCE TAX.

Nature of. The inheritance tax is not a tax upon property, but upon the right to succeed to property; it is not a debt of a decedent nor a charge upon his estate. It accrues, and is payable, immediately after the death of the ancestor or testator, and his estate must be appraised at, or as of, that time. The tax accrues at the decease, though payment may not be exacted until it is determined what has passed under the will or by descent.

Though, by statute, for convenience and certainty of collection, the personal representative is required to discharge the tax, it is in fact paid by the heir or devisee, and not by the estate.

The heir or devisee may discharge it from his own funds.—*The People v. Palmer's Estate*, 450.

INHERITANCE TAX—Continued.

Deductions—Statute Construed. Under the statute (Acts 1902, c. 3, secs. 21, 23, 24, Rev. Stat., secs. 5551, 5553, 5554) neither moneys expended by the executor for the upkeep of the home of the decedent, nor moneys expended to discharge an inheritance tax imposed by the laws of another state upon personalty located there, are to be deducted before computation of the tax.—*Id.*

INTEREST.

Contract for—Law of Place. Parties may lawfully stipulate for the payment of interest, according to the law of the place of payment. Interest may be recovered accordingly, although the contract be unlawful by the laws of the state where the contract was made.—*Baxter v. Beckwith*, 322.

Interest upon interest may, by express contract, be recovered, where this is permitted by the law of the place of payment.—*Id.*, 322.

Municipal Corporations cannot in any manner be made liable for, or legally pay, interest upon an account for services rendered. *BELL, J.*—*Colorado Springs v. Coray*, 460.

INSTRUCTIONS.

Construed. Action for an assault and battery, the complaint alleging malice, and demanding execution against the body. The answer denied malice. The court directed the jury to state in their verdict whether defendant, in committing the tort, was "guilty of either malice or evil intent." *Held* that the phrase "evil intent" was not intended by the court, or accepted by the jury, as a synonym of malice; and, not being contained in the statute, it was error to direct a finding thereon.—*Coryell v. Lawson*, 432.

IRRIGATION.

Maximum Rates for Use of Water. Under sec. 8 of article 16 of the constitution, neither the legislature nor any court has power to fix a maximum rate for the delivery of water. The power is vested exclusively in the boards of county commissioners.

The board can act only on the petition for an interested party.

The rate fixed by the board, when acting within its jurisdiction, is binding upon all persons affected thereby until vacated by the decree of some court of competent jurisdiction.

The board is not charged with the duty of seeing that the prescribed rate is observed by the carriers of water.—*McCracken v. Montezuma Co.*, 280.

Presumptions. It will be presumed, the contrary not appearing, that in prescribing a rate the board acted solely upon the evidence pro-

IRRIGATION—Continued.

duced before it, without any mixture of improper motive, and that the evidence was sufficient to support the order.—*Id.*, 280.

Prior Injunction—Effect. A decree of the district court vacated an order of the county commissioners prescribing a rate of charge, and enjoined the board from enforcing or attempting to enforce the rate so prescribed.

Upon a second petition, and due notice given to all concerned, the county commissioners, after full hearing, prescribed the same rate set down in the previous order so vacated. Held that the second order of the board was not to be regarded as a violation of the injunction, and, not being assailed by any direct proceeding, and no lack of jurisdiction or excess of authority being shown, the rate prescribed thereby became the lawful maximum rate binding all concerned.—*Id.*, 280.

Irrigating Company—Duty to Stockholders. A corporation operating an irrigating ditch is without authority to consent to any change in its works or conduits, for the benefit of one stockholder, and to the prejudice of another, without the consent of the latter, after a full knowledge of what is proposed, and with whatever provision for his protection he may demand as the condition of such consent.

The corporation is bound to see to it that the stockholder receives his proportion of the water with as little expense and inconvenience as if the change were not made, and without imposing upon him any increase in the cost of delivery, or any burden of maintaining or replacing the substituted device.—*Stuart v. Jefferson County*, 568.

Waste Water. A corporation operating an irrigating ditch is not under duty to carry water in excess of its decreed appropriation; nevertheless, if there is at any time surplus water in the ditch, any stockholder having need thereof is equitably entitled thereto, even though it may be in excess of the allowance, to which, measured by his holdings in the stock, he is entitled. And the stockholder having need of the water is entitled to complain if the corporation unnecessarily wastes it where it is of benefit to no one.—*Stuart v. Jefferson County*, 568.

Right of Appropriator in the Means Provided for the Conduct of Water. As a stockholder in an irrigating company, the plaintiff had a right to receive therefrom water for the irrigation of his land, and, by long user, to conduct it through an open ditch located upon the lands of an individual defendant. Held that neither such individual defendant, nor the county, nor the town where the premises were situated, was entitled to fill up or obstruct or destroy the open ditch, substituting another device therefor, without the consent of plaintiff, after full

IRRIGATION—Continued.

knowledge on his part, nor until provision was made, satisfactory to plaintiff, that the change should not interfere with the supply of the volume of water theretofore enjoyed by him, or its distribution, and for the maintenance, in like manner of the substituted device, and compensation to plaintiff of all damages occasioned to him by failure in such engagements, and that the former conditions should be restored if the substituted device were found inefficient, or the agreement should not be complied with.—*Stuart v. Jefferson County*, 568.

JUDGE.

Disqualification. One who had acted as attorney for an administrator in procuring his appointment was afterwards county judge of the same court in which the administration was pending. Several years after his professional connection with the administration had terminated, a petition was presented by the administrator for leave to sell certain lands of the intestate.

Held that the petition was a special proceeding, separate and distinct from the administration, and that nothing in the statute (Code, sec. 464) disqualified his honor from entertaining it.—*Ryan v. Geigel*, 122.

JUDGMENTS.

Presumptions. It will be presumed, the contrary not appearing, that in prescribing a rate for the use of water the board of county commissioners acted solely upon the evidence produced before it, without any mixture of improper motive, and that the evidence was sufficient to support the order.—*McCracken v. Montezuma Co.*, 280.

Whoever relies upon the order of a tribunal of specially limited jurisdiction has the burden of establishing the jurisdiction. Save as it appears from the record no presumption attends the proceedings of such tribunals.—*Goerke v. Manitou*, 482.

Conclusive Effect. The final judgment of a court having jurisdiction both of the subject matter and the person is conclusive upon collateral attack, even though shown to be erroneous.—*Austin v. King*, 363.

Appellee had obtained a decree permitting it to change the point of diversion of certain waters, to which it claimed to be entitled. Pending an appeal from this decree the appellants had, in another suit, obtained a judgment of the supreme court to the effect that the water so claimed by appellee had been abandoned, and that appellee had no right therein. That judgment was held conclusive of all matters involved in this appeal. The decree of the district court was reversed, and the cause remanded, with directions to the district court to deny the petition.—*Monte Vista Co. v. San Luis Valley Co.*, 230.

JUDGMENTS—Continued.

Record as Evidence. In an action to charge the directors of a corporation with its debts, under Rev. Stat., sec. 911, the mere record of a judgment recovered by plaintiff against the corporation is not admissible in evidence unless accompanied by the judgment roll. That the complaint upon which the judgment was rendered is also offered is not sufficient.—*Bovee v. Boyle*, 165.

The mere judgment entry, without the judgment roll, is not admissible as evidence of title.—*Parks v. Roth*, 296.

The record of the decree offered as evidence of title is not admissible unless accompanied by the judgment roll.

But it is not to be declared void upon collateral attack unless it shows affirmatively an absence of jurisdiction.—*Ross v. Newsom*, 393.

Void Judgments. Judgment by default upon substituted service, based upon an insufficient affidavit, disclosed by the record, is a nullity.—*Gibson v. Wagner*, 129.

Vacating. The court may vacate a void judgment or order even though an appeal has been perfected therefrom.—*Scott v. Watkins*, 340.

Relief in Equity. A decree of foreclosure rendered against the trustee in a deed of trust of lands, without service upon such trustee, may be vacated by an equitable action in the nature of a bill to remove a cloud upon title. *Semble*, a bill to redeem from a former mortgage foreclosed in such irregular proceeding would have been the better action, because affording full relief and a complete remedy.—*Watkins v. Perry*, 425.

Amendment of Record—Time of—Presumptions. The statute (Rev. Stat., sec 1537) provides that the county court may within the time allowed for filing an appeal bond extend the time, etc. An order amending the record, allowing time to file such bond, not applied for within the time so already limited, nothing in the record indicating that the one originally made was not made precisely as then intended, or that any inadvertence occurred therein, is void.—*Wellmuth v. Rogers*, 386.

It seems that no presumption of the regularity of the action of the court in such case is indulged.—*Id.*

Of Another State.

See CONSTITUTIONAL LAW.

LANDLORD AND TENANT.

Rights of Landlord. The landlord, on the tenant's abandonment of the premises or violation of the terms of the lease, is not required to re-let for the protection of the tenant. He may suffer the premises to remain vacant and recover the rent for the residue of the term.

LANDLORD AND TENANT—Continued.

But he may, at his election, enter and determine the lease, and at the same time recover the balance of rentals then due. He is not entitled to demand rents subsequently accruing.—*Wilson v. Agnew*, 109.

Rights of Tenant—Security for Rent. Where the tenant makes a deposit to secure his performance of the covenants of the lease and is dispossessed during the term for a default in the payment of rent, the deposit is not forfeited. The tenant recovers the balance, after deducting the damages suffered by the landlord by reason of the tenant's defaults, prior to dispossession.—*Wilson v. Agnew*, 109.

Manner of Tenant's Dispossession Is Immaterial. The result is the same whether the landlord accepts the tenant's voluntary surrender, or expels him.—*Id.*

Tenant Acquiring an Adverse Title. If the lands are sold for a tax which the tenant has covenanted to pay he cannot lawfully acquire the tax title.—*Schneider v. Hurt*, 335.

And where he purchases from the county a certificate of sale for a tax which he was not under obligation to pay, he does not entitle himself to a deed, upon such sale, by the payment of the subsequent taxes which he has covenanted with his landlord to pay; because he pays these, and must pay them, not for himself, but for his landlord; whereas, to entitle himself to such tax deed, he must have paid said subsequent tax for himself alone.—*Id.*, 335.

Tenant's Surrender—Effect. Tenant's surrender of leased premises, accepted by the landlord, extinguishes the relation of landlord and tenant, and discharges the tenant from all liability for rents subsequently accruing. Where there is no express agreement of the parties, the question whether a surrender has been effected depends on their intentions.—*Wilson v. Agnew*, 109.

LANDS.

Possession of—Constructive. One having the title is constructively in possession of vacant lands.—*Muntzing v. Harwood*, 292.

LIFE INSURANCE.

Contracts—Construction—Limitations Upon Authority of Soliciting Agent. When not controlled by statute, contracts of insurance are construed by the same rules of law as other contracts.

An insurance company, when not restricted by statute, may limit the authority of its agents, and an applicant for insurance dealing with an agent whose authority is limited by the express terms of the application cannot benefit by any act of the agent in excess of his authority as so limited.—*Modern Woodmen v. International Co.*, 26.

LIFE INSURANCE—Continued.

The applicant for insurance is presumed to read the application which he is required to sign.—*Id.*

Supreme Lodge v. Davis, 26 Colo., 252; *Pacific Life Company v. Van Fleet*, 47 Colo., 401; *Sun Fire Office v. Wich*, 6 Colo. App., 113; *Merchants' Company v. Harris*, 51 Colo., 109, examined and distinguished.—*Id.*

Construction of Policy. The policy stated that the insurer agreed as afterwards set forth, "in consideration of the representations made in the application therefor, which is hereby made the basis of and a part of this contract." Also it declared that "all the statements made in the application, and those contained in the declarations to the medical examiner, which with this declaration constitute an application to, etc., for insurance upon the life, etc., are offered to the said company as a consideration of the contract applied for," and that the assured adopted each of these statements as her own, and warranted them to be "full, complete and true." *Held* that not only the application proper, but all the other statements and declarations, by whatever name called, were part of the contract, and the basis of the policy.—*Germania Co. v. Klein*, 326.

False Representations, of a fact material to the risk, and upon which the policy is based, avoid it, even though such misrepresentations are the result of mistake, and made in good faith.—*Germania Co. v. Klein*, 326.

Representations Material to the Risk. A representation that the applicant had never consulted a physician is material to the risk, when in fact there was such a consultation, not in respect to some temporary ailment, but to a serious malady of chronic character.—*Id.*, 326.

So a gross misrepresentation as to the age of the applicant defeats the insurance *pro tanto*.—*Id.*, 326.

Insurance Obtained by Fraud—Premiums, are forfeited.—*Modern Woodmen v. International Co.*, 26.

LIMITATIONS.

Deed of Trust. Proceedings for the sale of lands under powers contained in a deed of trust are not an action, and are not barred by Rev. Stat., sec. 4061. Otherwise as to an action to foreclose, where an action at law is barred.—*Rowe v. Mulvane*, 502.

So of an equitable action for the appointment of a substitute trustee, to the end that such substitute may proceed under the power.—*Id.*

If such action can be regarded as otherwise than a bill of foreclosure it is within Rev. Stat., secs. 4070, 4071, 4073.—*Id.*

LIMITATIONS—Continued.

Express Trust. The rule that the statute of limitations does not run against an express trust ordinarily applies only between the trustee and the beneficiary. It has no application to a bill to foreclose a mortgage, nor to a bill for the appointment of a substitute trustee under a deed of trust.—*Rowe v. Mulvane*, 502.

Payment of Taxes. Tax deed recorded April 22, 1901. A tax paid in 1902 for the year 1901 is not to be counted as one of the successive yearly payments mentioned in the statute. (Rev. Stat., secs. 4087, 4090.)—*Parks v. Roth*, 296.

One claiming the benefit of the seven years' limitation (Rev. Stat., secs. 4089, 4090) cannot avail himself of the payment of a tax which, though not delinquent, was payable at the date when he acquired color of title. Seven full years must elapse between the first payment of taxes which became due and payable after color of title was taken, and the institution of an action by the paramount owner.—*Cristler v. Beardsley*, 369.

Taxes due prior to the recording of a treasurer's deed are not to be counted to support a plea of the seven years' statute (Rev. Stat., sec. 4087).—*Mercure v. Gibson*, 391.

Under the proviso of sec. 4090 of Rev. Stat., the owner of paramount title, in order to stay the course of the statute, must pay the taxes for one or more of the seven years next following the acquisition of color of title by the adverse claimant. Where one holding color of title pays all taxes upon the land for seven successive years, the payment of subsequent taxes by the holder of paramount title is of no avail.—*Newsom v. DeFord*, 582.

Color of Title. Void deed may be.—*Scott v. Ramseier*, 540.

A tax deed is not color of title until recorded.—*Parks v. Roth*, 296.

The Five Years' Statute, is not set in course by a void deed, and is not available to defendant in an action to quiet title. (Rev. Stat., sec. 5733.)—*Jones v. Empire Co.*, 382; *Buckland v. Fiedler*, 565.

When the Action Accrues—Demand Note. A promissory note bearing date "4-12-1901" was expressed to be payable " * * * after date." Interest was declared to be payable annually and to draw interest as principal. No demand of payment was made until 1904, and interest was paid from 1902 to 1906. *Held* manifest, in view of the terms of the paper and the conduct of the parties that it was not the intention that the note should become immediately due, and that the statute of limitations began its course upon the demand made in 1904.—*Baxter v. Beckwith*, 322.

MASTER AND SERVANT.

Servant's Assumption of Risk. Under Rev. Stat., sec. 2065, the servant never assumes the risk of the negligence of a fellow servant, unanticipated, and which he has no reason to anticipate.—*National Co. v. Maccia*, 441.

Contributory Negligence of Servant—Burden of Proof. Under Rev. Stat., sec. 2065, contributory negligence of the servant is an affirmative defense, and the burden of proof is upon the master.—*National Co. v. Maccia*, 441.

MAXIMS.

No One Shall Have Advantage of His Own Wrong. A foreign corporation which files with the secretary of state a certificate naming a particular person as its agent to receive service of process is affected by service upon such person. It will not be allowed advantage of its failure to file the certificate with the county clerk, as required by Rev. Stat., sec. 917.—*Austin v. King*, 363.

MECHANICS' LIENS.

Lien of Sub-Contractor—Filing of Contract. The purpose of the statute requiring the contract when in excess of \$500.00 to be filed for record with the recorder (Rev. Stat., sec. 4025) was to enable the owner of the premises to limit his liability to sub-contractors and material men. By compliance with the statute the owner may pay the contractor in installments, according to the provisions of the contract, without liability to a lien asserted by any sub-contractor, unless such sub-contractor gives the notice prescribed by the statute that he "has performed labor, or furnished material, * * * or agreed to and will do so."

When the owner fails to reduce the contract to writing, or to file it, or a memorandum of it, or where the contract price is \$500.00 or less, no provision of law is made whereby the owner may so limit his liability. The sub-contractor is entitled to a lien, without giving the notice so above specified, and regardless of the state of the account between the owner and contractor.—*Great Western Co. v. Gilcrest Co.*, 1.

Service of Lien Statement Upon Agent. The defendant being a foreign corporation, service of the statement of the lien required by the statute (Rev. Stat., sec. 4033) upon its cashier and bookkeeper, at the factory in the town where the building was erected, *held* sufficient.—*Great Western Sugar Co. v. Gilcrest Co.*, 24.

Evidence That the Material for Which the Lien Is Claimed Went Into the Building examined and held sufficient.—*Id.*, 26.

MORTGAGE.

Mortgagor and Mortgagee—Contract Between Construed. The holder of a certificate of purchase under a mortgage sale from which no redemption was made within the statutory period entered into an agreement with the mortgagor to convey the lands to him, upon certain conditions. The contract construed and held to be, as upon its face it imported, a contract of sale; and, not being in any part performed, it was held to confer no right.—*Ross v. Nichols*, 409.

Foreclosure—Parties. A decree foreclosing a mortgage is not rendered void by the failure to bring in a junior mortgagee.—*Watkins v. Perry*, 425.

A creditor, for whose security lands are conveyed to the public trustee, may defend a suit for the foreclosure of the deed of trust, or may prosecute a suit to redeem from a prior encumbrance.—*Id.*

Foreclosure Sale—Effect. On the expiration of the period of redemption allowed by the statute (Rev. Stat., sec. 3657) without redemption made, all right of the mortgagor in the premises is extinguished.—*Ross v. Nichols*, 409.

MUNICIPAL CORPORATIONS.

Contracts for Public Improvements. Under Rev. Stat., sec. 6579, no contract for the construction of a public improvement of any kind can lawfully be entered into by a municipal corporation except after advertisement, and then to the lowest responsible bidder.—*Colorado Springs v. Coray*, 460.

And under Rev. Stat., sec. 6675, the resolution or order to enter into the contract must be adopted with the concurrence of a majority of the members-elect of the council or board of trustees, and the ayes and nays must be recorded. The statute is mandatory and cannot be effectually waived. Every such contract must be express.—*Id.*

Services rendered in the construction of a public improvement under a contract entered into without the formalities required by the statute afford no action against the municipality, no matter how valuable such services may be, and though the corporation retains the results thereof.—*Id.*

A contract for skilled and technical services, *e. g.*, the employment of one as superintendent of the construction of a public building, is within the statute.—*Id.*

Estoppel. Where the statute has not been observed, the contract is void, and the municipality is not estopped to deny liability.—*Id.*

Ratification, of a contract of the character prescribed by the statute requires the same formality as the making thereof. A resolution of the city council accepting the resignation of the party "as superintendent

MUNICIPAL CORPORATIONS—Continued.

of construction" has not the effect to ratify his employment without the observance of such formalities.—*Id.*

Liability of Treasurer. Under Rev. Stat., sec. 6639, the city council have the election to either designate a bank where the corporate funds shall be kept, and thus relieve the treasurer and his sureties if the bank fails, or to decline making such designation, holding the treasurer as an insurer. The designation must be made by ordinance.—*Babcock v. Rocky Ford*, 313.

The deposit by a city in a bank of large sums of money as special interest-bearing deposits does not amount to such designation.—*Id.*

NEGLIGENCE.

Examples—Duty of Those Prosecuting Work Upon the Streets of the City, to keep danger lights burning during the night, wherever the public ways are obstructed by their work.—*Denver v. Borke*, 127.

The approach to the interior of a coal mine was by a tunnel of irregular width. Miners were passing there, frequently, in going to and from their work. The tunnel was unlighted. At places it was so narrow that the cars by which the coal was removed, or the coal loaded upon them, grazed the wall. The cars were operated at irregular times, without any signal given, and without any brake or other device for stopping them. The driver of a trip of six cars started them with his back in the direction of their motion, and so continued until a miner ascending the tunnel was struck and killed in one of the narrow parts of the tunnel. The light in the miner's cap would have been seen if the driver had been looking. *Held* that the driver was negligent.—*National Co. v. Maccia*, 441.

Pleadings. A complaint against a common carrier of passengers for an injury to a passenger, alleging negligence generally and specific acts of negligence, is to be assailed only by a motion to separate.—*Colorado Etc. Co. v. Jenkins*, 348.

Whether the plaintiff is required to prove the specific negligence charged, *quaere?*—*Id.*

The complaint alleged that defendant "so negligently and unskillfully managed said railroad and train, and the car which plaintiff was riding * * * that at, etc., by reason of all said acts of negligence, said car was violently overturned and upset," *held* sufficient as a general allegation of negligence on the part of the carrier.—*Id.*

Prior Accidents. In an action against a municipal corporation for injuries attributed to the defective condition of a public walk, evidence of prior similar accidents at the same place is admissible to show notice

NEGLIGENCE—Continued.

to the corporation of the defective condition of the walk where such notice is in issue.—*Meeker v. Fairfield*, 187.

Conduct of Defendant After the Accident. A party is not to be charged with negligence on mere proof that after the accident he repaired the alleged defect, or defective condition, to which the injury is attributed. Such conduct should receive the approval and encouragement of the courts.—*Id.*, 187.

NEW TRIALS.

Excessive Damages. A verdict is not to be set aside merely because, in the opinion of the court, the damages awarded are excessive, nothing indicating that the jury were controlled by passion or prejudice.—*Colorado Etc. Co. v. Jenkins*, 348.

Verdict Substantially Conforming to the Evidence, will be sustained.—*Tate v. Holly*, 218.

Motion—Statement of the Ground. Whoever applies for a new trial must distinctly advise the court, in apt time, of the ground of his application.—*Colorado Etc. Co. v. Jenkins*, 348.

A reason not asserted in the motion, nor in the assignment of errors, upon appeal, nor in the opening brief, will be disregarded.—*Id.*

Affidavits of Jurors, assuming to set forth the means used in reaching the verdict and the intention of the jury, will not be considered upon appeal.—*Baxter v. Beckwith*, 322.

PARTIES.

Non-Joinder—Waiver of Objection. Defendants making no objection to the non-joinder of an indispensable party, the defect will be overlooked where it appears that no injustice will result.—*Ross v. Nichols*, 409.

Defect of, must be raised by demurrer or answer, or is waived.—*Stuart v. Jefferson County*, 568.

Defendant. One acting for a town in the transaction complained of should not be made defendant, but the town itself.—*Id.*, 568.

Officer—Sued by Improper Title. The county treasurer is ex-officio public trustee, but the two offices are distinct. An action against him by his title "County Treasurer, trustee," not naming him as "public trustee," does not make him a party in the latter capacity.—*Watkins v. Perry*, 425.

PRACTICE IN THE SUPREME COURT.

See **APPEAL AND ERROR.**

PERPETUITIES.

The Rule Against, in this state, prohibits the suspension of the fee in lands, or the vesting of title to personalty, for a longer period than that of designated lives in being at the time of the death of the testator, and twenty-one years and nine months thereafter.—*Miller v. Weston*, 231.

PLACE, LAW OF.

See *INTEREST*.

PLEADINGS.

Complaint. A complaint seeking to charge a municipal corporation upon a contract, which, by a statute, must be express, should aver an express contract. No action lies upon a *quantum meruit* for services rendered under a contract entered into otherwise than according to the prescriptions of the statute.—*Colorado Springs v. Coray*, 460.

A complaint upon a contract, executory as to the plaintiff, must aver performance on his part, or set forth facts which excuse performance.—*Mulford v. Central Life Society*, 527.

Certainty—Allegations on Information and Belief. The complaint alleged, as to material facts, that plaintiff "is informed and verily believes," without the additional allegation "and on information and belief avers." Held the omission did not impair the sufficiency of the complaint, and the cause having been tried without regard to it, it was disregarded on appeal.—*Cockburn v. Kinsley*, 89.

Answer—Separate Defenses. Where distinct defenses are set up in one paragraph of the answer the plaintiff should move for a rule upon defendant to state and number them separately.—*Scott v. Watkins*, 340.

General Denial. Under a general denial of the title asserted by plaintiff, in an action to quiet title, accompanied by an allegation of title in fee, the defendant may assail the validity of a tax deed offered by plaintiff.—*Jones v. Empire Co.*, 382.

In ejectment the general denial admits defendant's possession.—*Stratton v. Murray*, 395.

What Must Be Specially Pleaded. Where, to a bill to quiet title, the defendant pleads a tax deed, the plaintiff, if he would assail its validity, must, in the reply, set up the particular matters upon which he relies to invalidate it.—*Scott v. Watkins*, 340.

Plaintiff deraigns title through a trustee's deed. Under the general denial, defendant may show that the sale therein recited was never held (Rev. Code, secs. 62, 287).—*Stratton v. Murray*, 395.

PLEADINGS—Continued.

The statute of frauds need not be pleaded where the plaintiff declares in the common counts.—*Anderson v. Dailey*, 175.

Abatement—Prior Action Pending, must be pleaded, or where there are no formal pleadings must be presented by proper objection at the trial.—*Brown's Estate v. Stair*, 140.

Demurrer. Failure to state in the complaint facts constituting a cause of action, or failure to show jurisdiction in the court, is ground of demurrer at any time, and it seems the defendant may demur *ore tenus*.—*Stuart v. Jefferson County*, 568.

The practice of inserting a demurrer in the answer discountenanced.—*Stuart v. Jefferson County*, 568.

Defects of Form. In an action by one school district against another under the last proviso to c. 202, Laws 1909, the complaint should aver that the sum demanded was a necessary charge, or facts from which this conclusion may be drawn, should give the name of the pupil, and state that he possessed the necessary qualifications. Failure in this respect is one of mere form, and being assailable by motion will not be deemed fatal on appeal.—*School District v. High School District*, 510.

Amendment—Liberality to Be Indulged. *Nisi prius* courts should be liberal in allowing amendments which may tend to secure a full investigation of the merits of the controversy whenever this can be accomplished without undue hardship upon, or prejudice to, the opposing party.—*McCracken v. Montezuma Co.*, 280.

More liberality is indulged in permitting the amendment of answers than of complaints.—*Id.*, 280.

Six days before the day of trial application was made for leave to file an amended answer. The failure to apply at an earlier day was excused, and the amendment set up matters constituting a complete *prima facie* defense to the action. The application was denied.

On appeal, there being no showing that the failure to apply at an earlier day occasioned any inconvenience or prejudice to plaintiff, the denial of the application was held an error.—*Id.*, 280.

Action against the officers of a foreign corporation, upon a promissory note of the corporation, which, it was alleged, though doing business in Colorado had failed to file with the secretary of state any copy of its charter as required by statute (Rev. Stat., sec. 916). An amendment of the complaint to the effect that such corporation had been carrying on business in Colorado for about one year prior to the execution of the note, *held* properly allowed.—*Cockburn v. Kinsley*, 189.

PLEADINGS—Continued.

Amendment Presumed. Where, upon proper application, in apt time, it would be the duty of the trial court to permit an amendment of the complaint to correspond with the proof, the complaint will, in the court of review, be treated as so amended.—*English Co. v. Hireen*, 199.

Waiver. Misjoinder of causes of action not raised either by demurrer or answer is waived.—*Stuart v. Jefferson County*, 568.

So of defect of parties.—*Id.*

Construed. In an action against the directors of a corporation under Rev. Stat., sec. 911, the complaint averred the recovery by plaintiff of a judgment against the corporation for a sum certain, with costs. Held that plaintiff must be regarded as counting upon the judgment so alleged, and that inasmuch as the judgment was not recovered until after the institution of the action, and after the directors had complied with the statute by filing the required report, there could be no recovery.—*Bovee v. Boyle*, 165.

Where the complaint averred that the corporation "duly incurred certain obligations," held that an "obligation" not being synonymous with the word "debt," used in the statute, the plaintiff should have pleaded the nature of these obligations, and that they fell within the class of liabilities contemplated by the statute.—*Id.*

And, where it appeared by the complaint that plaintiff had agreed to subscribe for four thousand shares of the corporation, and to pay therefor \$500.00 in cash, and the residue by a bankable note due in six months, and the agreement further provided that if the corporation should fail in certain undertakings set down in the agreement plaintiff should have the option of returning the stock, and that the corporation should refund to him the full amount which he had paid, but the complaint failed to show that the corporation had not complied with what was required of it by the agreement, or that plaintiff had elected to avail himself of his option, or even that he had complied with his part of the agreement, held there could be no recovery.—*Id.*

PRACTICE.

Motions—Notice. Under secs. 405, 406 of the code, the county court has no authority to extend the time for filing an appeal bond, without notice of the application first given to the adversary party.—*Wellmuth v. Rogers*, 386.

Oral Stipulation of Counsel Not Denied, is to be regarded as of equal force with a written stipulation. *Morse v. Budlong*, 5 Colo. App., distinguished.—*Tanquary v. People*, 531.

PRACTICE—Continued.

Judge Sitting at Chambers. A judge sitting at chambers in one county has no authority to direct judgment in a cause pending in another county. The order is void.—*Scott v. Watkins*, 340.

PRINCIPAL AND AGENT.

Evidence of Agency. The evidence examined and held insufficient to show that the alleged representative of the society was in fact such representative.—*Modern Woodmen v. International Co.*, 26.

Knowledge of Agent—How Far the Principal Is Charged by. The rule which charges the principal with the knowledge of the agent is for the protection of innocent third persons, and not those who use the agent to effect a fraud upon the principal.—*Modern Woodmen v. International Co.*, 26.

PUBLIC OFFICER.

Liability for Public Moneys Lost by Failure of Bank. A city treasurer who deposits the money of the city in a bank is liable therefor if lost by the failure of the bank.—*Babcock v. Rocky Ford*, 313.

QUIETING TITLE.

When the Action Lies. Vendee of lands failed to pay an installment of the purchase money at the day stipulated. The contract provided that upon such default it should be void, and both parties released, etc. Nevertheless the purchaser filed the contract for record, and asserted claim thereunder. *Held* that the vendors were entitled to a decree cancelling the contract and quieting their title.—*Hessell v. Neal*, 300.

Plaintiff's Title. The defendant showing no title cannot require the plaintiff to show either title or possession.—*Muntzing v. Harwood*, 292.

If the defendant puts in a sufficient answer, the plaintiff must prove his title. Showing neither title nor possession, a judgment in his favor cannot be sustained.—*House v. Grable*, 405.

Defendant's Title. Where defendant, by cross-complaint, prays that title in him be quieted, he occupies the same position as plaintiff, and must prove his title before the relief demanded can be awarded to him.—*House v. Grable*, 405.

Limitation. The five-year statute of limitations (Rev. Stat., sec. 5733) is no plea to a bill to quiet title.—*Parks v. Roth*, 296; *Scott v. Watkins*, 340; *Jones v. Empire Co.*, 382; *Mercure v. Gibson*, 391.

Tender of Taxes, paid by the defendant, is not required prior to the institution of a suit to quiet the title as against one holding under a tax title.—*Parks v. Roth*, 296.

PUBLIC TRUSTEE.

Nature of the Office. The office of public trustee is distinct from that of county treasurer. A complaint against the county treasurer, by that title only, with the addition of "trustee," nowhere naming him as public trustee, does not make the public trustee party.—*Watkins v. Perry*, 425.

RECOGNIZANCE.

See BAIL.

ROADS.

See HIGHWAYS.

SCHOOLS.

Legislative Control. School districts, being public agencies, they and their directors are subject to legislative control, save as the legislative power may be limited by the constitution.—*School District v. High School District*, 510.

High Schools—Pupils from Another District—Liability of District of Pupil's Residence. The requirement of the last proviso in sec. 6 of the act of April 23, 1909 (Laws 1909, c. 202), that the tuition fees of a pupil residing in one district, attending high school in another, shall be paid by the district of his residence, is not in violation of the provision for uniformity in sec. 2 of art. IX of the constitution.—*Id.*, 510.

STATUTES.

Construction. The statute of another state adopted into our legislation must be construed so as to harmonize with the other provisions of the enactment, and the general purpose thereof, as declared by our courts. The interpretation of such statute is not necessarily controlled by the decisions of the courts of the state from which it was adopted, following a different view and a different system.—*Great Western Co. v. Gilcrest Co.*, 1.

The statutes of eminent domain are to be strictly construed. They pass only such estate or interest in the lands as is reasonably necessary to accomplish the purpose had in view in the condemnation proceeding.—*Lithgow v. Pearson*, 70.

A statute authorizing imprisonment for a civil liability is strictly construed.—*Coryell v. Lawson*, 432.

Cotemporeaneous legislation upon cognate matters may be appealed to.—*Colorado Springs v. Coray*, 460, 474.

Neither the state, nor the counties or cities thereof are bound by the words of a statute unless expressly named.—*Id.*, 460, 481.

STATUTES—Continued.

Construed. The act of 1901 (Laws 1901, c. 52, Rev. Stat., secs. 901-912) has not the effect to repeal Rev. Stat., secs. 916, 919.—*Cockburn v. Kinsley*, 89.

Under the Revenue Act of 1901 (Laws 1901, c. 94) all taxes become due and payable when the tax warrant was delivered to the treasurer; and the ultimate date of such delivery was the first of January next succeeding the levy.—*Cristler v. Beardsley*, 369.

The phrase "responsible bidder" in Rev. Stat., sec. 6579, is not limited to pecuniary responsibility, but extends as well to the skill, experience and integrity of the party bidding.—*Colorado Springs v. Coray*, 460.

But it has no application to services of superintendents and the like, rendered by a salaried officer pursuant to statute.—*Id.*

STATUTES CONSTRUED, CITED OR REFERRED TO.**Revised Statutes, 1868—**

C. 76 *Goerke v. Manitou*, 482.

General Statutes—

Sec. 2953 *Id.*

Mills' Statutes—

Sec. 4780 *Brown's Estate v. Stair*, 140.

Revised Statutes, 1908—**Sec.**

684 *McKibbin v. Paul*, 184.

846 *Austin v. King*, 363.

856 *Id.*

911 *Bovee v. Boyle*, 165.

916 *Cockburn v. Kinsley*, 89.

917 *Austin v. King*, 363.

919 *Cockburn v. Kinsley*, 89.

1219 *Nordloh v. Adams County*, 457.

1241 *Morris v. Adams County*, 416.

1251 *Id.*, *Nordloh v. Adams County*, 457.

1537 *Wellmuth v. Rogers*, 386.

1947 *Tanquary v. People*, 531.

2065 *National Co. v. Maccia*, 441.

2067 *Coryell v. Lawson*, 432.

2096 *Morris v. Adams County*, 416.

2099 *Id.*

2415 *Stuart v. Jefferson County*, 575.

2420 *Lithgow v. Pearson*, 70.

2431 *Id.*

STATUTES CONSTRUED, CITED OR REFERRED TO—Continued.

- 3024, 3025 *Coryell v. Lawson*, 432.
 3162 *Colorado Springs v. Coray*, 460.
 3657 *Ross v. Nichols*, 409.
 4025, 4026 *Great Western Co. v. Gilcrest Co.*, 1.
 4033 *Id.*, 24.
 4061 *Rowe v. Mulvane*, 502.
 4068 *Morris v. Adams County*, 416.
 4070, 4071 *Rowe v. Mulvane*, 502.
 4073 *Id.*
 4087 *Parks v. Roth*, 296.
 4089 *Cristler v. Beardsley*, 369.
 4090 *Id.*, *Newsom v. DeFord*, 582; *Parks v. Roth*, 296.
 5551 *People v. Palmer's Estate*, 450.
 5553, 5554 *Id.*
 5703 *McCord Co. v. McIntyre*, 376.
 5730 *Scott v. Watkins*, 340; *Parks v. Roth*, 296; *Scott v. Ramseier*, 540.
 5733 *Buckland v. Fiedler*, 565; *Parks v. Roth*, 296; *Scott v. Watkins*, 340; *Jones v. Empire Co.*, 382.
 5849 *Goerke v. Manitou*, 482.
 6000 *School District v. High School District*, 510.
 6006 *Id.*
 6007 *Id.*
 6008 *Id.*
 6579 *Colorado Springs v. Coray*, 430.
 6639 *Babcock v. Rocky Ford*, 312.
 6803-6816 *Pueblo Co. v. Pueblo*, 554.
 6861 *Watkins v. Perry*, 425.
 7081 *Miller v. Weston*, 231.
 7088 *Id.*
 7095 *Id.*
 7102 *Id.*
 7103 *Id.*
 7183 *Ryan v. Geigel*, 122.
 7210-7212 *Brown's Estate v. Stair*, 140.
 7254 *Miller v. Weston*, 231.
 7267, par. 6 *Fagan v. Troutman*, 251.

Laws—

- 1893, c. 143 *Schneider v. Hurt*, 335.
 1894, c. 4, sec. 5 *Id.*
 1901, c. 94, secs. 10, 11, 121 *Cristler v. Beardsley*, 369.
 1901, c. 52 *Cockburn v. Kinsley*, 89.

STATUTES CONSTRUED, CITED OR REFERRED TO—Continued.

1909, c. 202 *School District v. High School District*, 510.

Revised Code—**Sec.**

- 40 *Austin v. King*, 363.
- 43 *Id.*
- 45 *Gibson v. Wagner*, 129; *Brown v. Whetstone*, 371; *Mercure v. Gibson*, 391; *Watkins v. Perry*, 425.
- 61 *Stuart v. Jefferson County*, 580.
- 62 *Stratton v. Murray*, 395.
- 236 *Colorado Co. v. Jenkins*, 349.
- 274 *Hessell v. Neal*, 300.
- 287 *Stratton v. Murray*, 395.
- 405, 406 *Wellmuth v. Rogers*, 386.
- 464 *Ryan v. Geigel*, 122.
- 471 *Scott v. Watkins*, 340.

SUMMONS.

Publication—Affidavit. No provision of the code allows the statement on information and belief of any of the matters required to be stated in an affidavit to secure the service of summons by publication. The statement as to defendant's postoffice address, or that it is not known, must be made in positive terms.—*Gibson v. Wagner*, 129.

There were several defendants, one of them a Colorado corporation which could reside nowhere but in Colorado. The affidavit to support an application for the publication of the summons stated that all these defendants "either reside out of this state, or have departed thence, without any intention of returning, or conceal themselves so as to avoid service of process." Held that these averments, as applied to many defendants, individual and corporate, taken in connection with the failure to give the postoffice address of any defendant, or to state that the address was unknown, suggest an effort to conceal, rather than to provide, information of the suit. As to a Colorado corporation, it was noted that the affidavit could not be true; that such a corporation cannot depart the state nor conceal itself. And, it appearing that this corporation, being trustee in a deed of trust under which the defendant claimed title to the lands in litigation, it was not reasonable to suppose that if the summons had reached the corporation it would not have been communicated to the defendant.—*Id.*

Constructive service of process, complying with the statute, is as effectual as personal service. That the published summons did not come to the notice of the defendant therein is unimportant. A decree quieting title to lands upon such service is not to be impeached and

SUMMONS—Continued.

annulled by evidence *aliunde* the record that the plaintiff in the action had no title.—*Brown v. Whetstone*, 371.

Publication of the summons made upon affidavit of the attorney, not showing why it is not made by the plaintiff, or in which material averments are made upon information, or which fails to show that plaintiff is not informed of the residence of the defendant, is not a compliance with the statute. Judgment by default thereon is void.—*Mercure v. Gibson*, 391.

Publication upon an affidavit which fails to state either the defendant's postoffice address, or that it is unknown, is not a compliance with the statute, and a judgment by default thereon is void as to the defendant upon whom service is so attempted.—*Watkins v. Perry*, 425.

TAXES.

As Between Grantor and Grantee of Lands. Under Rev. Stat., sec. 5703, one who conveys lands between the 30th of June and the first of the succeeding January is liable, there being no express agreement to the contrary in the conveyance, for irrigation district taxes previously assessed.—*McCord Co. v. McIntyre*, 376.

TAX TITLES.

Duty of One in Possession of Lands to Pay the Taxes Assessed Thereon. One in possession of lands under a void deed is not estopped to acquire title thereto, under a sale made for the non-payment of a tax assessed while he is so in possession.—*Scott v. Ramseier*, 540.

Void Deed. A treasurer's deed reciting a sale to the county and an assignment of the certificate of purchase by the county clerk, after the lapse of three years from the sale, is void.—*Parks v. Roth*, 296; *Mercure v. Gibson*, 391.

A treasurer's deed executed upon a sale to the county, which fails to show the day upon which the lands were sold, is void, *e. g.*, a deed reciting only that the treasurer, at a tax sale "begun and held on the first day of October, etc., did expose to sale," etc.—*Jones v. Empire Co.*, 382.

A treasurer's deed showing affirmatively but one offer for the lands, and a sale to the county on the day of such single offer, is void upon its face.—*Buckland v. Fiedler*, 565.

A deed reciting that the treasurer did, on July 11th, at a sale begun, etc., on July 7th, expose to sale the real property, etc., and the county having offered to pay the amount of taxes, etc., the property was stricken off to it, *held* void.—*Id.*, 565.

Sale to County—Subsequent Taxes. One who purchases from the county a tax purchase certificate is not entitled to a deed until he has

TAX TITLES—Continued.

paid all taxes subsequently assessed upon the lands.—*Schneider v. Hurt*, 335.

Sale to County—Assignment of Certificate. Under chapter 143 of the Laws of 1893, and sec. 6 of chapter 4 of the Laws of 1894, where lands are purchased by the county, at tax sale, the treasurer may assign the certificate at any time after the sale is made, and the clerk, at any time within three years from the date of the sale.—*Schneider v. Hurt*, 335.

The assignee must pay all taxes which are due and unpaid at the date of the assignment. If any such tax has been paid by the owner, or any third person, the assignee is not required to repeat the payment.—*Id.*, 335.

Tax Deed—As Evidence. A tax deed regular upon its face is *prima facie* proof of the regularity of the sale (Rev. Stat., sec. 5730).—*Scott v. Watkins*, 340.

TORTS—Body Judgment.

See **EXECUTIONS**.

TOWNS.

See **MUNICIPAL CORPORATIONS**.

TRIALS.

Opening Case After Submission—Discretion. Plaintiff in ejectment was informed, long before the trial, by a witness assuming cognizance of the fact, that a trustee's deed under which he deraigned title was executed without any sale made by the trustee. Held that it was his duty to anticipate this defense, and prepare to meet it upon the trial, and that it was not an abuse of discretion to refuse an application made after the submission of the cause, and before judgment, for leave to put in testimony in contradiction of that given upon the trial, to establish this defense.—*Stratton v. Murray*, 395.

Pleading and Evidence—Variance. Action against a mining corporation and one who had acted as manager of its affairs for the wages of plaintiff, the complaint being in the common counts for work and labor. The evidence showed that, at most, the individual defendant was a mere guarantor that the corporation would pay. Held there could be no recovery.—*Anderson v. Dailey*, 175.

A deed offered only as color of title does not support an allegation of title in fee.—*Jones v. Empire Co.*, 382.

Complaint in the common counts is not supported by evidence that defendant guaranteed payment by another.—*Anderson v. Dailey*, 175.

Offer of Evidence for a Special Purpose. One offering a deed as

TRIALS—Continued.

color of title merely cannot afterwards invoke it as evidence of title in fact.—*Parks v. Roth*, 296.

Directing Verdict. Where, in an action upon a life policy, a material representation made by the insured, and declared to be the basis of the policy, is shown by uncontradicted evidence to be false, the question is not to be submitted to the jury.—*Germania Co. v. Klein*, 326.

Testimony of Party in Interest Uncontradicted, is not conclusively presumed to be true. Its credibility must be left to the jury. To direct a verdict upon the assumption of its truth, is error. Especially is this so, where, in addition to the pecuniary interest, it appears that the party so testifying is animated by a sense of wrong imputed to the adversary party, his memory appears frequently at fault, for a period of years he failed to assert the claim which is the foundation of the action, and then presented the claim for a much smaller sum.—*Colorado Springs v. Coray*, 460.

TRUSTS.

Resulting Trust—Evidence. A resulting trust in lands will not be declared, except upon evidence which is clear, positive and convincing, or, as some courts declare, excluding all reasonable doubt.

The evidence examined and declared too indefinite and unsatisfactory to establish the trust.—*Fagan v. Troutman*, 251.

Conveyance Between Husband and Wife. Where the husband pays the purchase money on lands and takes a conveyance to the wife, it is presumed that a gift was intended; whereas, if the purchase money is paid by the wife, and the title conveyed to the husband, a resulting trust is presumed.—*Fagan v. Troutman*, 251.

Evidence Required to Establish a Resulting Trust in Land. In the same case it was contended that the evidence to sustain plaintiff's claim to a moiety of the fee should be of the same character as required to establish a resulting trust in land, i. e., clear, certain, satisfactory, and, according to some authorities, conclusive. The court, not conceding this proposition, were of the opinion that, even admitting it to be sound, the plaintiff's claim was sufficiently established by the testimony of the client as to the conversations had at the time of Brown's employment. The client, it was said, was not a stranger to the transaction, but a party, and materially interested, and her testimony was not mere hearsay, or declarations of a party made to a stranger, or a mere chance conversation, such as condemned by the authorities. Being credited by the jury, it was sufficient to convincingly establish a definite agreement as to the division of the fee.—*Brown's Estate v. Stair*, 140.

VENDOR AND VENDEE.

Tender of Abstract of Title. A receipt for \$500.00 as "part of the purchase price" of lands described, provided that an additional sum should be paid on a day named, abstract of title to be furnished showing a good merchantable title, and that if the additional cash payment should not be made on the day specified the receipt would be void, and the \$500.00 forfeited as liquidated damages. The vendors called at the office of the purchaser on the day prior to that appointed for the second payment, to complete the transfer, and, that day being Sunday, called again on the following Monday, tendering the abstract. No demand for the abstract had been made by the purchaser. Held that the tender of the abstract was in time. The abstract being certified to within three days of the tender, and the land being situate in Weld county, while all the parties resided in Denver, it was observed by the court that it was unreasonable to expect an abstract certified down to the hour of tender.—*Hessell v. Neal*, 300.

Purchaser's Objections—Shifting Position. The purchaser defaulting in the payment of the purchase money at the day stipulated, and then basing his refusal entirely upon his financial inability, cannot afterwards allege a defect in the abstract of title tendered to him, nor that it was not tendered in proper time.—*Hessell v. Neal*, 300.

VENUE.

Change of—Time of Application. An application for the change of the venue, first interposed after the issues have been made up and the cause is ready for trial, is not in apt time.

Stronger reasons dictate the importance and necessity of expedition in will contests, and other causes affecting the administration of estates, than in ordinary civil causes.—*Miller v. Weston*, 231.

Local Prejudice. An application for a change of venue, in a will contest, on the ground of local prejudice, and for the convenience of witnesses, is within the discretion of the trial court. Its determination will not be disturbed if no abuse of the discretion appears.—*Miller v. Weston*, 231.

WATER RIGHTS.

Decree Adjusting, specifically limiting the use of water decreed to the appellee to the irrigation of their own lands, which were accurately described, and allowing the use of the water only when necessary, providing that all waters not used by appellee shall go to appellant for the irrigation of his lands, provided he shall comply with the contract upon which his rights were based, held sufficiently definite to protect the right of the appellant.—*Rollins v. Fearnley Co.*, 85.

WILLS.

Interpretation. The intention of the testator is to be ascertained from the entire context of the will, and must be given effect if not prohibited by law.

Invalid Provision, not so inseparably connected with other valid clauses that if stricken therefrom the general purpose of the testator will be defeated, will be rejected, and the residue established.—*Miller v. Weston*, 231.

Construed. The testator bequeathed his entire estate by words of present gift to certain relatives and friends, directing his executors to convert all his property into money and make the distribution. He appointed persons named "executors of this, my will, and trustees of my property, real and personal, and all rights and credits, to whom, *on the admission of this will to probate*, the title of my said property shall go, in trust, however, for the realization of said rights and credits, and the conversion into money of said real estate and personal property * * * and the distribution of all the proceeds," etc. In other provisions he enjoined upon the executors the immediate sale of all his property and the distribution of the proceeds. Except as produced by the words italicized, there was no suspension of the fee in lands, the vesting of the title to the personalty, nor of the power of alienation. *Held* that the will must be read in connection with the statute (Rev. Stat., sec. 7088); that the words "on the admission of this, my will, to probate" have no other or different effect, in substance, than the words of the statute; that considering the other provisions of the statute, requiring the executors to institute proceedings for the probate of the will within thirty days after the testator's death (Rev. Stat., sec. 7103), a presumption should be indulged that the will will be admitted to probate, certainly within the period of some life in being and twenty-one years thereafter, and, there being no precedent life estate, such presumption should be so conclusive that the bare possibility to the contrary should not be regarded as involving a violation of the rule against perpetuities.—*Miller v. Weston*, 231.

Held further, that the words "to whom, on the admission of this, my will, to probate, the title of my said property shall go," may be rejected, and that, rejecting this clause, a valid power in trust to sell, convert and distribute was created and that the will, as a whole, might be sustained, without the offending clause.—*Id.*

Contest—Directing Verdict. In will contests, the court has the same power to direct a verdict as in ordinary civil causes. Whether error is committed is to be determined by the same rules in both cases.—*Miller v. Weston*, 231.

WITNESS.

Competency. Under the act of April 3rd, 1907 (Laws 1907, c. 231, Rev. Stat., sec. 7267, par. sixth), a married woman residing with her husband, in the house of her stepfather, by his request, nothing more being shown as to their relations, is not a member of his family, and is not competent to testify as to a conversation between the stepfather and another, in an action in which she seeks to establish as against the heirs at law of the stepfather, a resulting trust in lands of which the stepfather died seized in fee.

The statute qualifies only those living with the deceased, who, upon his demise, would inherit from him.—*Fagan v. Troutman*, 251.

WORDS AND PHRASES.

"Family," in its broadest sense, includes those who descend from a common progenitor; in a less comprehensive sense, those living together as one household, under one head; in a still more limited sense, only parents and their children. In a statute not prescribing the sense in which the word is used, it is to be interpreted according to the context and the subject matter.—*Fagan v. Troutman*, 251.

"Obligation"—"Debts," not synonymous.—*Bovee v. Boyle*, 165.

"Doing business," a single transaction is not.—*Cockburn v. Kinsley*, 89.

E. S. M.
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